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70-299

No. 1844

In the Supreme Court of the United States

OCTOBER TERM, 1970

UNITED STATES OF AMERICA, PETITIONER,

v.

AFRAN TRANSPORT COMPANY, AS OWNER OF THE STEAMSHIP NORTHERN GULF, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ERWIN N. GRISWOLD,
Solicitor General,
L. PATRICK GRAY, III
Assistant Attorney General,
SAMUEL HUNTINGTON,
Assistant to the Solicitor General,
WALTER H. FLEISCHER,
RONALD R. GLANCZ,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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No.

UNITED STATES OF AMERICA, PETITIONER,

v.

AFRAN TRANSPORT COMPANY, AS OWNER OF THE STEAMSHIP NORTHERN GULF, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 435 F. 2d 213. The opinion of the district court (App. D, *infra*) is reported at 309 F. Supp. 650.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on December 1, 1970. A timely petition for rehearing was denied on January 18, 1971 (App. C, *infra*). On April 12, 1971, Mr. Justice Har-

lan extended the time for filing a petition for a writ of certiorari to and including June 17, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether—in the light of a Coast Guard regulation cautioning mariners not to rely completely on buoys where fixed aids to navigation on shore are available—a vessel's sole reliance on an off-station buoy to avoid a well-known and fully-charted shoal required a finding of negligence on the part of the vessel and a division of damages resulting from the vessel's grounding on the shoal.

2. Whether the rule of *The Pennsylvania,* 19 Wall. 125, placed upon the vessel the burden of proving that its violation of the Coast Guard regulation could not have contributed to the grounding.

REGULATION INVOLVED

33 C.F.R. 62.25–55 provides:

> *Caution.*
>
> (a) Buoys are liable to be carried away, shifted, capsized, sunk, etc.; lighted buoys may be extinguished or sound buoys may not function as the result of storm, the accumulation of ice, running ice or other natural causes, collision or other accident.
>
> (b) For the foregoing reasons, mariners should not rely completely upon the position or operation of floating aids to navigation, but should also utilize bearings from fixed objects and aids to navigation on shore.

STATEMENT

This case arises out of the stranding on November 25, 1963 of the 696 foot supertanker "Northern Gulf" while approaching the harbor of Portland, Maine, on a well-known and fully charted shoal in Casco Bay. The vessel was seriously damaged, much of her cargo of 261,429 barrels of crude oil was spilled and the Maine shoreline suffered extensive pollution. In actions brought against the United States under the Suits in Admiralty Act, 46 U.S.C. 741, *et seq.*, by the vessel's owner, Afran Transport Company, and the owner of the cargo, British American Oil, Ltd., the district court found that the United States was solely liable for the damage by virtue of the Coast Guard's negligence in failing to maintain on station a buoy marking the location of West Cod Ledge Rock.

The court rejected the government's contention that the vessel's pilot's sole reliance on the buoy—despite the presence of shore-based navigational aids which, had bearings been taken, would have warned the vessel of its own position in relation to the shoal and despite the existence of a long-standing Coast Guard regulation cautioning mariners not to rely on buoys where fixed aids to navigation on shore are available, 33 C.F.R. 62.25–55 [1]—required a finding of negligence attributable to the vessel and a division of damages.

[1] This regulation has been in force since at least 1936. See 33 C.F.R. 402.13 (1938 rev.) (Bu. Circ. 609, Nov. 14, 1936); 33 C.F.R. 402.13 (1943 Cum. Supp.); 33 C.F.R. 62.25–50 (1949 rev.) (13 F.R. 7772, 7774); 33 C.F.R. 62.25–55 (1962 rev.); 33 C.F.R. 62.25–55 (1967 rev.); 33 C.F.R. 62.25–55 (1968 rev.); 33 C.F.R. 62.25–55 (1969 rev.).

On the government's appeal, limited to the issue of the pilot's negligence, the court of appeals affirmed.

1. At about 0900 hours on November 25, 1963—a bright clear day with almost unlimited visibility (App. E., *infra,* p. 53; App. 95a, 247a) [2]—the "Northern Gulf" passed the Portland Lightship (App. E, *infra,* p. 53; App. 41a), and shortly thereafter took aboard a compulsory state pilot, Captain Wadleigh, to navigate the vessel from the lightship into the harbor (App. E, *infra,* p. 53; App. 41a). On the bridge with the pilot were the tanker's master, third officer, quartermaster, lookout, deck cadet and, at times, her first mate (App. E, *infra,* p. 53; App. 41a). Under the pilot's direction, the tanker was put on an initial course of 315° true, intending to pass about ¼ mile to the west of the West Cod Ledge Rock Buoy No. 2 (App. E, *infra,* p. 54; App. 41a).[3]

[2] App. E, *infra,* contains the findings of the district court. "App." references are to the two volume appendix before the court of appeals, a copy of which is being lodged in this Court.

[3] Reproduced as Appendix F, *infra,* is Afran Exhibit 33, a chart showing the actual course of the tanker prior to the stranding (course line to the right) as well as the course which the pilot thought he was following (course lines to the left). West Cod Ledge Rock Buoy No. 2 (partially obscurred on the chart by the dots marking the point where the stranding occurred) was established in 1914 and marks the position of West Code Ledge Rock, one of several shoals making up West Cod Ledge (App. 81a; 465a). The charted position of the buoy is 150 to 200 yards east of the westernmost portion of the rock, which portion is at a depth of 32 feet at mean low water (App. 189a, 465a). To pass safely, therefore, the "Northern Gulf," which at the time of the standing was drawing 35′ 6″ (App. E, *infra,* p. 53; App. 338a), would have had to pass at least 150 yards to the west of the charted position of the buoy.

From the time he came aboard until the stranding, Captain Wadleigh navigated the vessel solely by "seaman's eye," *i.e.*, only by visual sightings without reference to charts, azimuth circles, a gyrocompass, radar, a fathometer, or other navigational equipment, all available on the "Northern Gulf" (App. 151a, 169a, 209a). The initial course change and all subsequent changes were instituted without navigational fixes being taken. The radar was not in operation.

The vessel remained on its initial course of 315° for 13 minutes (App. E, *infra*, p. 54). When the West Cod Ledge Rock buoy was about two points (22–½°) forward of the starboard beam and 600 yards off, the vessel turned slowly to the right toward the Witch Rock buoy eventually steadying on a course of 346–¼° true. It remained on this course for four minutes until 0931 hours when the vessel stranded. At this time, the pilot thought that he was on a course of 348° true (App. 64a–65a). The Captain of the vessel thought that the vessel was on a course of 345° true (App. 393a–399a).

The "Northern Gulf" stranded on the western portion of West Cod Ledge Rock (see App. F, *infra*, p. 63), with the West Cod Ledge Rock buoy about 400 yards to the east of the vessel. The Coast Guard subsequently determined that the buoy was actually located 350 to 400 yards east of its charted position (App. E, *infra*, p. 55; App. 43a, 4a).[4] There had been

[4] Official records establish that this buoy had had a relatively good history of remaining on its charted position, although it had been found off-station six times, the most recent time being December 1962, 11 months prior to the stranding (App. 41a, 141a, 142a, 432a–436a).

no published report that the buoy was off-station. Three Portland lobstermen had discovered the buoy off its normal position in the Spring of 1963, eight months prior to the standing (App. E, *infra,* p. 56;), but did not report this fact to the Coast Guard. From December 11, 1962 to November 25, 1963, many deep laden vessels had proceeded safely past the shoals (*ibid*). None of these vessels reported to the Coast Guard that the buoy was off-station. The "Northern Gulf", under the same master, had also proceeded through the area on April 30, 1963 (*ibid.*).

The pilot, Captain Wadleigh, had piloted 34 vessels of the approximate draft of the "Northern Gulf" through this channel from April 1963 through November 25, 1963, and many more vessels of lesser draft (App. 86a). He never took any bearings during these runs and never discovered that the buoy was off-station (App. 150a–151a).

It was uncontradicted at trial, however, that, while on the 315° course between the light vessel and West Cod Ledge, bearings could have been taken on Cape Elizabeth, Portland Head, Ram Island, and Halfway Rock, all fixed navigational aids provided by the Coast Guard (App. 105a–106a; 450a–451a). Captain Wadleigh emphasized that Cape Elizabeth and Portland Head were approximately 70° apart in bearing and thus could have provided good two-object fixes (App. 165a–169a). Captain Wadleigh testified that even if he had taken only a single bearing on Portland Head Lighthouse, he could have determined whether his vessel was too far to the north and heading into dan-

ger (App. 131a–132a, 137a). Another of Afran's witnesses stated without contradiction that "if bearings were taken when the ship steadied on 315 the result is bearings could have been plotted in ample time to have raised a doubt as to the safe navigation of the vessel" (App. 464a).

Finally, Captain Wadleigh also admitted at trial that he could have used pre-determined turn bearings to assist him in determining when to initiate his turn towards the Witch Rock buoy (App. 138a–139a). Under this procedure, the pilot would have plotted in advance on a chart (or committed to memory from earlier trips) what the bearings of Cape Elizabeth and Portland Head should be when the vessel would have cleared West Cod Ledge Rock sufficiently to permit a turn to the North. With this information, Captain Wadleigh, by taking periodic bearings on the two fixed aids from the bridge while the vessel was underway, could have determined when to initiate a safe turn without having to plot actual fixes and without having to rely solely on the West Cod Ledge Rock buoy (*ibid.*).

2. The district court held the government solely liable for the stranding of the "Northern Gulf" and the resultant damages. It found the Coast Guard negligent in failing to maintain the buoy in its charted position (App. E, *infra,* pp. 60–61), and held that the "Northern Gulf" was not negligent in its exclusive reliance on the buoy; the United States was therefore not entitled to invoke the admiralty rule of divided damages.

The court ruled that "'Northern Gulf's' pilot had the right to rely on West Cod Ledge Rock Buoy No. 2" (App. E, *infra*, pp. 61–62) and that (App. E. *infra*, p. 58)

> [t]he pilot had no reason to suspect that the Buoy was off its charted position and knew that the Buoy was in constant view of Coast Guard units who were required to check its position. It was not unreasonable for him to expect that the Coast Guard would warn him if the Buoy was off its charted position.

The court approved a custom of mariners of relying solely upon buoys, absent their awareness of facts indicating that the buoy was off-station (App. D., *infra*, pp. 46–48). The court found the language of the applicable Coast Guard regulation—stating that "mariners should not rely completely" upon buoys, 33 C.F.R. 62.25–55—to be "cautionary" and not a rule of navigation sufficient to invoke the strict liability rule announced in *The Pennsylvania*, 19 Wall. 125[5] (App. D, *infra*, p. 42; App. E, *infra*, p. 61). Finally, the district court found that even if cross bearings had been taken while the "Northern Gulf" had been proceeding on the 315° course, they would have shown that the ship was on a safe course to pass clear of West Cod Ledge Rock and that once the ship began its slow turn in the vicinity of the buoy there was in-

[5] The rule imposes upon a vessel involved in an accident and found to be operating in violation of a statute intended to prevent accidents, the heavy burden of proving that the statutory violation *could not* have been a cause of the accident. 19 Wall. at 136.

sufficient time to fix the vessel's position prior to the stranding (App. E, *infra,* pp. 58–59).

The Second Circuit affirmed the district court's decision in substantially all respects (App. A, *infra,* pp. 17–30). The court agreed with the district court that the pilot was justified in assuming that the buoy was in its charted position and also held that the rule of *The Pennsylvania* arose only when a statute or regulation, not complied with, was mandatory in character.

REASONS FOR GRANTING THE WRIT

This case presents an important question concerning the duty of a harbor pilot to utilize fixed navigation aids rather than to rely upon floating buoys as the sole basis for piloting a vessel through waters containing significant navigation hazards. The decision below fails to give practical effect to a longstanding Coast Guard regulation, 33 C.F.R. 62.25–55, as construed by the Coast Guard, and significantly lowers the high standard of care traditionally imposed by this Court and lower courts upon vessels navigating in the area of known shoals or other obstructions to navigation. In view of the vast number of buoys maintained by the Coast Guard, the importance of the holding that despite the abundance of reliable navigational aids on shore vessels can proceed by "seaman's eye," relying solely upon floating aids, is apparent.[6]

[6] A hearing on damages held subsequent to the decision of the court below fixed the liability of the government in this case at more than $1,000,000. There are presently pending in the district courts at least 13 suits seeking damages in the aggregate of about $10,000,000, on which the decision in this case will have a direct bearing.

The holding below, absolving an oil-laden tanker which polluted a shoreline of any responsibility, is especially unfortunate at a time when Congress and the courts have striven to increase obligations of care to protect the environment in general,[7] and to avert oil spillages in particular.[8]

1. The pertinent regulation, 33 C.F.R. 62.25–55,[9] set forth at p. 2, *infra,* notes that buoys "are liable to be carried away, shifted, capsized, sunk, etc" and states that

> * * * mariners should not rely completely upon the position or operation of floating aids to navigation, but should also utilize bearings from fixed objects and aids to navigation on shore.

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[7] See, *e.g.*, Water Quality Improvement Act of 1970, Pub. L. 91–224, 84 Stat. 91; National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. (Supp. V) 4321, *et seq.* See also *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, No. 1066, 1970 Term, decided March 2, 1971; *United States* v. *LeBeouf Bros. Barge Co.*, 368 F. 2d 221 (C.A. 5).

[8] See, *e.g.*, Section 11(f)(1), of the Water Quality Improvement Act which provides in part:

> Except where an owner or operator can prove that a discharge [of oil] was caused solely by * * * (C) negligence on the part of the United States Government * * *, such owner or operator of any vessel from which oil is discharged in violation of subsection (b)(2) of this subtion shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) for the removal of such oil by the United States Government [subject to certain monetary limitations].

[9] 14 U.S.C. 2 gives the Coast Guard authority to "promulgate and enforce regulations for the promotion of safety of life and property on the high seas and on waters subject to the jurisdiction of the United States * * *."

That the regulation is consistent with sound navigational procedure is shown by standard navigation publications. Thus, the Coast Guard's *List of Lights and Other Marine Aids—Atlantic Coast,* vol. I, p. X, states that it "is *imprudent* for a navigator to rely on floating aids to navigation to always maintain their charted positions" (emphasis added) and that *"whenever possible, a ship should be navigated by bearings or angles on fixed objects on shore and by soundings, rather than by reliance on buoys"* (emphasis original). A well-known textbook on navigation echoes the same standard: "A vessel's position should, when possible, be plotted not by buoys, but by bearings or by angles of fixed objects on shore." Dutton, *Navigation and Nautical Astronomy* (6th ed., 1939), p. 141; see also Riesenberg, *Seamanship for the Merchant Service* (2d ed., 1936), p. 505.

The net effect of the regulation is, we submit, to codify a standard of care recognized as sound by navigation authorities. This interpretation has been concurred in by the Fifth Circuit in *Humble Oil & Refining Co.* v. *The Tug Crochet,* 422 F. 2d 602, 607, wherein it was noted:

> The fact that the light on the wreck buoy was inoperative at the time of this collision does not excuse this negligence. Common sense and regulations tell even landlubbers that floating aids to navigation are liable to be carried away or disabled through natural causes or accidents and are not as reliable as shorebased navigation aids. [Citing 33 C.F.R. 62.25–55 and other authorities].

See also, *The Royal Oak* (*Cities Service Oil Co.* v. *United States*), 1967 A.M.C. 66 (S.D.N.Y.); *The Hercules*, 81 Fed. 218 (N.D. Cal., 1897); *The Miles Standish*, 1928 A.M.C. 215 (S.D.N.Y.); *cf. Philadelphia Elec. Co.* v. *Curtis Bay Towing Co.*, 260 F. Supp. 505 (E.D. Pa.), affirmed, 390 F. 2d 125 (C.A. 3).

It is uncontroverted that the pilot of the "Northern Gulf," Captain Wadleigh, relied *solely* on the West Cod Ledge Rock buoy to avoid West Cod Ledge Rock; it is also uncontroverted that fixes could have been taken while the vessel was on course 315° true approaching West Cod Ledge [10] and that, even without fixes, predetermined turn bearings could have been utilized to assist the pilot in determining when it was safe to initiate a turn towards the Witch Rock buoy (see *supra*, pp. 6–7). Either elementary procedure, and particularly the latter, would have entailed a minimum of effort on a vessel as well equipped as the "Northern Gulf."

Despite the clear language of the Coast Guard regulation and supporting authorities and despite the relative ease with which Captain Wadleigh could have

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[10] While we do not challenge the court of appeals' acceptance of the district court's finding that a fix taken while the vessel was on the 315° course would have shown the ship to be on a safe course (see *supra*, pp. 8–9), that finding does not bear on the question whether Captain Wadleigh was justified in initiating a turn solely on the basis of the buoy. While it is true that a fix would have shown the 315° course to be "safe," it also would have indicated how much further along that course the vessel would have to travel before initiating a safe turn. Moreover, a fix would have disclosed to the pilot that he was further to the east than he thought (see App. F, *infra*, p. 6a), thus putting him on notice that the buoy was displaced.

made use of Cape Elizabeth and Portland Head, the court of appeals held that because the pilot had no notice of facts indicating that the West Cod Ledge Rock buoy was off-station and because he knew the Coast Guard had an obligation to maintain the buoy, he was justified in relying solely on the buoy. *The Tug Crochet, supra,* and other cases relied upon by the government were distinguished on the grounds that the mariners in those cases could have used available ranges [11] to determine a safe course without having to take bearings (App. A, *infra,* pp. 26–27). There is no suggestion in 33 C.F.R. 62.25–55, however, that the regulation applies only when a mariner is no notice that a buoy is out of place; indeed, the regulation was clearly promulgated to cover the situation where no notice exists, for once a mariner is on notice of a buoy's displacement, he does not need to be told to be on guard. Finally, the attempted distinction of other cases on the basis of the availability of ranges cannot withstand scrutiny. Ranges are only one type of navigational aid; fixed lighthouses are another. As we have pointed out, Captain Wadleigh could have utilized the fixed aids with a minimum of effort.[12]

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[11] A range consists of a pair of fixed markers or lights which, when lined up, indicate a safe course over a given stretch of water.

[12] The courts below relied in part upon, and condoned, a custom of merchant vessels proceeding solely in reliance upon buoys and "seaman's eye." But a custom cannot take precedence over a valid regulation. Indeed, even were there no regulation, such a plainly negligent custom would not exonerate the vessel of liability. *The T. J. Hooper,* 60 F. 2d 737 (C.A. 2), certiorari denied, 287 U.S. 662.

In our view, the decision below is inconsistent with the high standard of care to which harbor and river pilots have traditionally been held. See, *e.g., Atlee* v. *Packet Co.,* 21 Wall. 389, 396; *Davidson S. S. Co.* v. *United States,* 205 U.S. 187, 194; *Essex County Elec. Co.* v. *M/S Godafoss,* 129 F. Supp. 657, 659–660 (D. Mass.). See also, *The Bella Dan,* 1968 A.M.C. 900, 907–909 (C.A. 4).[13] In the present day of supertankers carrying cargoes capable of inflicting severe harm on the environment, it is particularly important that high navigational standards be maintained.

2. The court below also erred in failing to apply the rule of *The Pennsylvania,* 19 Wall. 125, imposing upon the violator of a safety statute[14] the heavy burden of proving—to escape liability—that its violation *could not* have contributed to an accident. The lower court's characterization of the Coast Guard regulation as "cautionary" rather than "mandatory" and "ambiguous at best" (App. A, *infra,* p. 28) as a basis for avoiding the consequences of the strict liability rule is unsound. While the regulation may not be "mandatory" in the sense that it prohibits sole reliance on buoys in all cases, its applicability to situations where fixes can readily be taken—and particularly to an oil laden vessel proceeding in an area of known shoals in near perfect weather—is clear. Under such circumstances, the foundations for the application of the rule of *The Pennsylvania* are established.

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[13] In *The Bella Dan*, the Fourth Circuit condemned the practice of "eyeball" navigation by pilots.

[14] It is settled that the violation of a safety regulation constitutes a statutory fault making applicable the *Pennsylvania* Rule. *E.g., Belden* v. *Chase*, 150 U.S. 674.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
L. PATRICK GRAY, III,
Assistant Attorney General.
SAMUEL HUNTINGTON,
Assistant to the Solicitor General.
WALTER H. FLEISCHER,
RONALD R. GLANCZ,
Attorneys.

JUNE 1971.

APPENDIX A

United States Court of Appeals for the Second Circuit

Nos. 121 & 122—September Term, 1970

(Argued October 20, 1970 Decided December 1, 1970)

Docket Nos. 34302 & 34303

AFRAN TRANSPORT COMPANY, as Owner of the STEAMSHIP NORTHERN GULF, PLAINTIFF-APPELLEE,

against

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT.

BRITISH AMERICAN OIL CO., LTD., PLAINTIFF-APPELLEE,

against

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT,

and

S.S. NORTHERN GULF AND AFRAN TRANSPORT COMPANY, CLAIMANTS-THIRD PARTY DEFENDANTS-APPELLEES.

MEDINA, Circuit Judge. This case arises out of the stranding on November 25, 1963 of the supertanker "Northern Gulf" on the westerly tip of West Cod

Ledge Rock in Casco Bay, approaching the harbor of Portland, Maine. There was considerable damage to the vessel, a good part of her cargo was lost and the Maine shoreline suffered extensive pollution. Judge Tenney's opinion is reported at 309 F. Supp. 650. The underlying cause of the stranding was the displacement of West Cod Ledge Rock Buoy No. 2 a distance of 350 to 400 yards, bearing 097¾ degrees from its charted position. The Government does not dispute its fault in failing for a period of some eight months to discover the shifting of the buoy and to restore it to the proper position, and the sole issue before us is whether Judge Tenney correctly held the Government solely at fault, exonerating the pilot and the officers of the vessel.

In view of the comprehensiveness of Judge Tenney's excellent opinion we shall condense our statement of the facts of the case, and make it just sufficient to serve as an introduction to the discussion, in the concluding portion of this opinion, of the Government's claim that the failure of the pilot and the ship's officers to ascertain the exact location of the displaced buoy prior to the stranding by utilizing "bearings from fixed objects and aids to navigation on shore" (Code of Federal Regulations, Title 33, Navigation and Navigable Waters, Section 62.25–55) [1970][1] constitutes such a statutory fault as to make applicable the drastic rule of *The Pennsylvania,* 86

[1] Section 62.25–55 *Caution.*

(a) Buoys are liable to be carried away, shifted, capsized, sunk, etc.: lighted buoys may be extinguished or sound buoys may not function as the result of storm, the accumulation of ice, running ice or other natural causes, collision or other accident.

(b) For the foregoing reasons, mariners should not rely completely upon the position or operation of floating aids to navigation, but should also utilize bearings from fixed objects and aids to navigation on shore.

U.S. (19 Wall.) 125 (1873). If this rule were applicable the "Northern Gulf" would be under the burden of proving that the failure to take bearings not only might not or probably did not but that it could not have contributed to the stranding. Judge Tenney rejected this argument and held the vessel bound only to prove that the stranding was caused by the fault of appellant and that there was no contributing negligence on the part of the pilot or the officers of the "Northern Gulf." We agree with Judge Tenney and affirm the decree appealed from.

I

On November 25, 1963 weather conditions in Casco Bay were just about perfect. It was a bright, clear day with almost unlimited visibility. The current was at the last two hours of the ebb tide and neither the current nor the moderate wind from the NW affected navigation. All the many lighthouses and various types of buoys marking the rocks and ledges of this characteristic portion of the coast of Maine were plainly visible. Under these favorable conditions the "Northern Gulf," on a voyage from Bandar, Mashur, in the Arabian Gulf, to Portland with a cargo of 261,429 U.S. barrels of crude oil, on a course 276 degrees true brought Portland Lightship abeam 700 yards off her port side. The compulsory state pilot came on board from a pilot boat stationed about ½ mile NW of the Lightship; and he took the con on the bridge with a full and proper complement of the vessel's officers.

From the bridge of the "Northern Gulf," Captain Harlan L. Wadleigh, the pilot, had a complete and quite satisfactory view of the broad expanse of water he was to traverse before closing in on Portland Harbor. The course he intended to take, and the one he

often had taken before, in the performance of his customary duties, was to pass between the bell buoy marking Corwin Rock and West Cod Ledge Rock Buoy No. 2, perhaps somewhat favoring the starboard side of this opening to facilitate a gradual turn to starboard to pass West Cod Ledge Rock Buoy No. 2 and get in position for a new course passing the buoys marking Pine Tree Ledge and Jordan Reef to port and Witch Rock to starboard. There was no occasion to take any bearings and by use of what is called his "seaman's eye" he brought the vessel to a 315 degree true course with Portland Head Light fine on the port bow and West Cod Ledge Rock Buoy No. 2 15 degrees true on the starboard bow. The vessel remained on this 315 degree course for about 12 minutes and Captain Wadleigh intended to pass about ¼ mile off West Cod Ledge Rock Buoy No. 2. It is vigorously asserted by the Government that, had bearings been taken and plotted during the progress on this 315 degree course, the pilot would have known that he was proceeding into danger, which, we think, is another way of saying that he would have been alerted to the displacement of the buoy. But Judge Tenney's finding to the contrary is supported by the proofs, including the charts, especially when it is taken into consideration that the displacement of the buoy from its charted position, a mere 350 or 400 yards in a wide expanse of open water, was not to the NE and over the middle shoal of West Cod Ledge but on the bearing 097¾ degrees, above mentioned.

There was no occasion for taking and plotting any bearings to obtain fixes while the vessel was on the 315 degree course, and had any such bearings been taken and plotted they would have shown that the "Northern Gulf" was on a safe course.

When the West Cod Ledge Rock Buoy No. 2 came off the starboard beam Captain Wadleigh began his turn to starboard. From that time until the vessel fetched up she was on a swing, her forward progress until she steadied up on her new course being something in the neighborhood of 4 knots. Her position was constantly changing and it was manifestly impossible to take a running fix in time to avoid the stranding. Judge Tenney so found and we agree with this finding and all the others set forth in the specific findings and in his opinion.

II

So we turn to the critical subject of whether the pilot or the officers of the vessel had any reason to suspect that West Cod Ledge Rock Buoy No. 2 was off station. For, in the absence of some suspicious circumstance or notice, navigators are entitled to rely upon the representations made in the Government charts relative to the location of the buoys. See *The Clevelander*, 83 F.2d 947, 949 (2d Cir. 1936); *Trinidad Corp.* v. *S.S. Sister Katingo*, 280 F. Supp. 976, 977 (S.D.N.Y. 1967); *Chesapeake & O. Ry.* v. *United States*, 1964 A.M.C. 2651, 2654 (E.D. Mich.), *amended*, 1966 A.M.C. 1883, 1884 (E.D. Mich. 1962) (not otherwise reported).

It is clear, to begin with, that even the most experienced navigator fully familiar with local conditions could not detect by the use of his eyesight that this displacement of 350 to 400 yards had taken place. There was no point of reference such as existed in some of the cases to which we shall later refer. The reef itself was too far below the surface of the water to disturb the even sequence of the waves or give any other notice of its location.

Some lobstermen using their fathometers in connection with the hauling of traps had discovered the displacement of the buoy some eight months prior to the stranding. But the lobstermen had not notified the Coast Guard. Indeed, the constant reading of the Coast Guard publications by Captain Wadleigh, including the daily memoranda issued on Saturdays in the form of mimeographed sheets, and occasional reports by land-line phone calls from the Coast Guard base at South Portland, was of no avail as none of the Coast Guard publications or notifications had made any reference to the displacement of this buoy.

The explanation given by Captain Wadleigh for his reliance upon the buoy was accepted by Judge Tenney and it appears to us to be in every way satisfactory. The record shows:

> (1) That the Coast Guard was responsible for the monitoring of the buoys and that it had ample means at its disposal to keep the buoys under close surveillance. Portland Light Vessel should have checked the position of the buoy by a bearing or sextant angle. If it had done so a 3-degree difference would have been revealed between the charted and the actual position of the buoy at the time of the stranding. Cape Elizabeth Life Boat Station was amply manned and appropriate documents specifically listed this particular buoy among others with respect to which the range and bearing were required to be checked at fixed intervals. The buoy tender Cowslip had the primary duty of monitoring this buoy. She passed the buoy on numerous occasions during the eight months period of displacement, 10 times between October 1, 1963 and the date of the stranding. The Coast Guard cutters Acushnet, Barataria, Coos Bay and Cook Inlet were all based in Portland and regularly passed in and out of Portland

Harbor. Surely it was not unreasonable for a professional pilot, with knowledge of the duties of those in charge of these Government vessels with respect to floating aids to navigation, to assume that, in the absence of some notification to the contrary, or some storm or other known incident to account for displacement, the buoy was in its charted position.

(2) Official records disclosed and the testimony of the pilot was to the effect that the buoy had a good record of remaining in its charted position. For some months prior to the stranding there had been no bad storms or other conditions at all likely to affect the position of the buoy. In fact the cause of the displacement is still a complete mystery so far as appears in the record before us.

(3) Several of the local professional pilots testified and they confirmed Captain Wadleigh's statement that it was the custom not to take and plot bearings to check the position of West Cod Ledge Rock Buoy No. 2, and that they customarily relied on this buoy in piloting deeply-laden vessels in and out of Portland Harbor. Moreover, it appeared without contradiction that many other vessels similar to the "Northern Gulf" had during the period of displacement of the buoy passed over the same waters without incident.

The Government challenges Judge Tenney's statement in his opinion: "The fact that other vessels successfully traversed the area is easily explainable since the 7′ to 11′5″ tide range would permit vessels drawing more than 'Northern Gulf' to pass over the very same spot at high water." We disagree with this criticism as the chart shows a depth of 32 feet at mean low water on the western tip of the ledge where the vessel stranded and she had a draft of 35′6″ forward and aft.

(4) There were no ranges available to the pilot on his course from the Lightship to the vicinity of West Cod Ledge Rock Buoy No. 2, a circumstance of vital importance in view of the fact that the existence of ranges, the use of which would have immediately revealed the displacement of buoys, was the critical factor in some o fthe cases strongly relied upon by the Government. We shall discuss these cases later.

Thus, assuming the "drastic" rule of *The Pennsylvania* not to be applicable under the circumstances of this case we conclude that Judge Tenney properly found the Government solely to blame for the stranding.

However, as the Government has chosen, in its argument in favor of the applicability of the rule of *The Pennsylvania,* to rely upon several cases which bear only on the issue of negligence and which have, in our judgment, no relevancy to the issue of whether or not 33 C.F.R. Section 62.25–55 (1970) imposes a mandatory duty to take bearings on fixed landmarks and not to rely on buoys, we shall briefly discuss the cases principally relied upon, prior to our treatment of the rule of *The Pennsylvania* point.

The Government relies especially upon *The Hercules,* 81 Fed. 218 (N.D. Cal. 1897). This is indeed "a famous old case" and it is refreshing to read District Judge Morrow's salty opinion. While the case does involve a displaced buoy, there is no reference whatever to the much more famous opinion of Justice Strong in *The Pennsylvania,* decided in 1873. The importance of *The Hercules* and what made the case famous is that it formulated a principle to govern the duties of tugs toward their tows in "crowded harbors." Thus the crux of the case lies in the following statement, 81 Fed. at 226:

> While it is true that there is a presumption that the buoys correctly indicate the places of danger, still it does not justify navigators, particularly masters of tugs, who are selected and employed for their supposed familiarity with obstacles to navigation in crowded harbors, in following blindly these signals of danger.

The towing operation in *The Hercules* consisted in moving the Benjamin F. Packard, a vessel 244.2 feet in length and 26.8 feet in depth, from the north side of a wharf in San Francisco Bay "into the stream for the purpose of completing her loading." Precisely opposite the wharf and only 475 feet away was Mission Bay Rock, a well-known obstacle to navigation. The buoy marking Mission Bay Rock had been displaced a distance of 200 feet. While the master of the "Hercules" did not know of this displacement, the court held that the duty of the master of a tug to his tow required him to be familiar with the presence and location of the rock. The holding was (81 Fed. at 225):

> Applying the law as established by these cases, it follows that the master of the "Hercules" should have had such familiarity with the location of Mission Bay Rock, even though the buoy, indicating where it was, had been displaced some 200 feet. That distance, at the short range from Long wharf, where the towage began, was sufficient to have been observed by a careful pilot.

In fact the master of the "Hercules" did not even look to see if the buoy was where he could not have failed to know where the rock was. All this, of course, has to do with the finding of fault on the part of the master, negligence pure and simple.

Philadelphia Electric Co. v. *Curtis Bay Towing Co.*, 260 F. Supp. 505 (E.D. Pa. 1966), *aff'd*, 390 F.2d

125 (3d Cir. 1968), also strongly relied upon by appellant, is practically a replica of *The Hercules*. No reference is made to 33 C.F.R. Section 62.25–55 (1970) or to the rule of *The Pennsylvania*. The master of a tug with a coal barge in tow, at what was close to low water, instead of proceeding directly to the channel adjacent to the Windy Point coal pier off the Philadelphia Naval Base, cut across Horshoe Shoal, a well-known obstacle to navigation, in the immediate vicinity of the coal pier and fetched up. The court held the master of the tug solely at fault despite the displacement of a buoy that was supposed to mark both the shoal and the channel. This was because the buoy was "so far removed from its charted position" that the master of the tug, who was perfectly familiar with local conditions off the coal pier, should have known that there was not sufficient water in the river to warrant navigation "at the then stage of the tide."

The various cases involving ranges apply the same principle. If a range is available all the navigator need do is to look up the range. If the buoy is on the range instead of where it is supposed to be the navigator is on notice that it has been displaced. And, if he fails to take the trouble to look, of course he is at fault. See *Canada S.S. Lines, Ltd.* v. *Great Lakes Dredge & Dock Co.*, 81 F. 2d 100 (7th Cir. 1935); *Dibble* v. *United States*, 295 F. Supp. 669 (N.D. Ill. 1968); *Standard Dredging Corp.* v. *S.S. Syra*, 290 F. Supp. 260 (D. Md. 1968); *Humble Oil & Ref. Co.* v. *The Tug Crochet*, 288 F. Supp. 147 (E.D. La. 1968), *aff'd*, 422 F. 2d 602 (5th Cir. 1970); *Philadelphia Elec. Co.* v. *Curtis Bay Towing Co., supra; United States* v. *Sigfridson*, 1964 A.M.C. 2341 (D. Ore. 1963) (not otherwise reported); *The Manhattan*, 3 F. Supp. 75 (E.D. Pa. 1932), *aff'd per curiam*, 63 F. 2d 995 (3d Cir. 1933); *The Miles Standish*, 1928, A.M.C. 215

(S.D.N.Y. 1919) (not otherwise reported); *The Somers N. Smith*, 120 Fed. 569 (D. Me. 1903).

The reliance by appellant upon so many cases that on their face appear to be clearly inapplicable to situations involving the violation of statutory duties and the rule of *The Pennsylvania* would seem to be due to that itch to pile up quotations with words or phrases that seem to fit the case in hand when torn from the context in which they were written. While we do not say any impropriety is involved, as practically every lawyer has at one time or another yielded to the temptation to do this, we do say this habit is not to be encouraged. It only serves to increase the labors of the judges and perhaps momentarily to confuse them.

III

The doctrine of *The Pennsylvania* has been applied to a great variety of situations, involving regulations as well as statutes.[2] Nor does the rule affect collision cases only.[3] It is of the essence of all these cases that

[2] *Belden* v. *Chase*, 150 U.S. 674 (1893); *In Re Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964), *cert. denied*, 380 U.S. 944 (1965); *Rowe* v. *Brooks*, 329 F.2d 35 (4th Cir. 1964); *Afran Transp. Co.* v. *The Bergechief*, 274 F.2d 469 (2d Cir. 1960); *United States* v. *The J. A. Cobb*, 283 F.2d 754 (2d Cir. 1960); *Merritt-Chapman & Scott Corp.* v. *Cornell S.S. Co.*, 265 F.2d 537 (2d Cir. 1959); *O/Y Finlayson-Forssa A/B* v. *Pan Atl. S.S. Corp.*, 259 F.2d 11 (5th Cir. 1958), *cert. denied*, 361 U.S. 882 (1959); *Diamond State Tel. Co.* v. *Atlantic Ref. Co.*, 205 F.2d 402 (3d Cir. 1953); *Tide Water Associated Oil Co.* v. *The Syossei*, 203 F.2d 264 (3d Cir. 1953); *Leathem Smith-Putnam Nav. Co.* v. *National Union Fire Ins. Co.*, 96 F.2d 923 (7th Cir. 1938).

[3] *Waterman S.S. Corp.* v. *Gay Cottons*, 414 F.2d 724 (9th Cir. 1969); *Commercial Transp. Corp.* v. *Martin Oil Serv., Inc.*, 374 F.2d 813 (7th Cir. 1967); *Atlantic Pipe Line Co.* v. *Dredge Philadelphia*, 247 F. Supp. 857 (E.D. Pa. 1965), *aff'd per curiam*, 366 F.2d 780 (3d Cir. 1966).

the statute or regulation be mandatory in character, as the rule is designed to compel compliance with clearly defined duties. Typical instances are mandatory directions with reference to lookouts, fog signals and the carrying of lights at night. When the statute or regulation is in terms of cautionary suggestions only, then the alleged failure to take certain precautions in certain given situations is absorbed into the ultimate finding of fault or negligence or the absence of fault or negligence contributing to the loss and damage involved in the particular case.

It is not without significance, we think, that, despite the numerous cases where displaced buoys were part of the *mise-en-scène* of maritime collisions, strandings and other similar mishaps that have come under judicial scrutiny, this is the first time, as far as is revealed by our research, that the failure to "utilize bearings from fixed objects and aids to navigation on shore" where buoys were off station has been claimed to warrant the application of the rule of *The Pennsylvania.* This may well be due to the heading of the Regulation, "Caution," and the absence of such phraseology as "must" or "shall." Moreover, in cases with respect to lookouts, lights, fog signals and so on the precise duty owed by mariners in each instance is carefully spelled out. Here the very phrase "should not rely completely" is inherently ambiguous at best, especially when closely followed by the phrase "but should also utilize." There would seem to be no middle ground. Either mariners are merely cautioned to be careful, especially where there have been storms, ice, fouling of a buoy by collision or other accident, which must mean storms, ice or accident known or likely to be known by the mariner in the particular case, or, as the Government appears to claim here, the navigator must take bearings and make calculations every time

he is about to pass a buoy. What this amounts to is giving the Regulation an interpretation which construes the statement which only says mariners should not rely "completely" on buoys in such a way as to say that mariners should not rely on buoys at all if they are able to take fixes. That such an innovation would be impractical and unenforceable seems apparent. And if it be said that the supposed mandatory requirement is applicable only to important buoys, guarding especially dangerous reefs, who is to decide which are the unimportant buoys as the vessel passes by?

Accordingly, we agree with Judge Tenney's conclusion that 33 C.F.R. Section 62.25–55 (1970) does not prohibit or mandate any particular conduct sufficient to invoke the drastic rule of *The Pennsylvania*.

IV

Because of a statement in Judge Tenney's opinion, that may possibly be misconstrued, we shall add a few words on the subject of presumptions. Of course, the stranding of the "Northern Gulf" on a well-known and well-charted rocky ledge at the principal approach to Portland Harbor raised a presumption of fault,[4] and Judge Tenney so held. But this presumption ceased to be of any force and effect when Judge

[4] *Brown & Root, Inc.* v. *American Home Assur. Co.*, 353 F.2d 113, 117 (5th Cir. 1965), *cert. denied*, 384 U.S. 943 (1966); *Philadelphia Elec. Co.* v. *Curtis Bay Towing Co.*, 260 F. Supp. 505, 512 (E.D. Pa. 1966), *aff'd*, 390 F.2d 125 (3d Cir. 1968); *Indian Towing Co.* v. *United States*, 182 F. Supp. 264, 270 (E.D. La. 1959), *aff'd*, 276 F.2d 300 (5th Cir.), *cert. denied*, 364 U.S. 821 (1960); *New York Trap Rock Corp.* v. *The Dynamic*, 50 F. Supp. 507, 508 (E.D.N.Y. 1942), *aff'd per curiam*, 136 F.2d 683 (2d Cir. 1943); *The Helen B. Moran*, 255 Fed. 342, 344 (E.D.N.Y. 1918).

Tenney made his finding, based as we have seen on substantial evidence, that "[T]he fault of the Coast Guard in failing to maintain Buoy No. 2 on its charted position is established as the sole proximate cause of the stranding of "Northern Gulf." The type of presumption discussed in *The City of New York,* 147 U.S. 72, 85 (1893) and quoted in Judge Tenney's opinion at 309 F. Supp. 658–59 is of a wholly different character and does not affect the disposition of the issues in the case before us.

Affirmed.

APPENDIX B

United States Court of Appeals for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of December one thousand nine hundred and seventy.

Present: Hon. HAROLD R. MEDINA; Hon. STERRY R. WATERMAN; Hon. WILFRED FEINBERG, *Circuit Judges.*

(Docketed as a judgment #71,252 on January 27, 1971)

AFRAN TRANSPORT COMPANY, AS OWNER OF THE STEAMSHIP "NORTHERN GULF," PLAINTIFF-APPELLEE

v

UNITED STATES OF AMERICA DEFENDANT-APPELLANT

BRITISH AMERICAN OIL CO., LTD.,
PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLANT,

and

SS. "NORTHERN GULF" & AFRAN TRANSPORT CO.,
CLAIMANTS-THIRD PARTY, DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed, with costs to be taxed against the appellant.

A. DANIEL FUSARO, *Clerk.*

APPENDIX C

No. 34302–3

United States Court of Appeals, Second Circuit

AFRAN TRANSPORT COMPANY, AS OWNER OF THE STEAMSHIP "NORTHERN GULF," PLAINTIFF-APPELLEE,

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT.

BRITISH AMERICAN OIL CO., LTD., PLAINTIFF-APPELLEE,

v.

UNITED STATES OF AMERICA, DEFENDANT AND THIRD-PARTY PLAINTIFF-APPELLANT,

SS "NORTHERN GULF" AND AFRAN TRANSPORT COMPANY, CLAIMANT-THIRD PARTY DEFENDANT.

A petition for a rehearing having been filed herein by counsel for appellant, United States of America, Upon consideration thereof, it is ordered that said petition be and it hereby is denied.

HAROLD R. MEDINA,
STERRY R. WATERMAN,
WILFRED FEINBERG,
Circuit Judges.

JANUARY 18, 1971.

APPENDIX D

United States District Court, Southern District of New York

No. AD. 249

AFRAN TRANSPORT COMPANY, AS OWNER OF THE STEAMSHIP "NORTHERN GULF," PLAINTIFF,

against

UNITED STATES OF AMERICA, DEFENDANT.

No. AD. 421

BRITISH AMERICAN OIL CO., LTD., PLAINTIFF,

against

UNITED STATES OF AMERICA, DEFENDANT,

and

SS NORTHERN GULF AND AFRAN TRANSPORT COMPANY, CLAIMANT-THIRD PARTY DEFENDANT.

OPINION

TENNEY, J. These actions were brought by plaintiff Afran Transport Company (hereinafter referred to as "Afran") as owner of the Steamship "Northern Gulf," and plaintiff British American Oil Co., Ltd. (hereinafter referred to as "British American"), the cargo owner, to recover damages from defendant

United States of America resulting from the stranding of said vessel in the harbor of Portland, Maine.[1] These are actions in admiralty for which a remedy is provided under the Suits in Admiralty Act, as amended in 1960, 46 U.S.C. § 741, *et seq.*; *Wilcox* v. *United States,* 1964 A.M.C. 1206 (S.D.N.Y. 1964); *Tankrederiet Gefion A/S* v. *United States,* 241 F. Supp. 83 (E.D. Mich. 1964). Interest is allowable on any damages that may be awarded from the date that suit was filed. *Petition of Oskar Tiedemann & Co.,* 236 F. Supp. 895, 910 (D. Del. 1964). At the trial, four witnesses testified for Afran and British American, and one witness testified in behalf of the United States. Thirty-one witnesses testified by deposition.

On the morning of November 25, 1963, the tanker "Northern Gulf," a single screw super tanker of 696 feet 4 inches overall length, 90 feet 6 inches breadth, 48-ft. depth, with a cargo of crude oil and a draft of 35 feet 6 inches forward and aft, arrived off Portland Lightship on a voyage from Bandar, Mashur, to Portland, Maine, and passed that vessel at about 0900 hours.[2] She was laden with British American's cargo of approximately 261,429 U.S. Barrels of Iranian crude oil destined for the Canadian Pipeland dock at Portland, Maine, for delivery to British American as consignees.[3] The weather was clear, visibility good (9 to 10 miles), wind moderate N/W, tide last of ebb.[4] On course 276 degrees true, she brought the Lightship abeam 700 yards off her portside, fixing the position with a radar range and visual bearing on

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[1] Page 1. Defendant impleaded Afran in the action brought by British American and both actions were consolidated for the purpose of trial.

[2] Page 2. Agreed Finding of Fact No. 1 (Affid. 1); Exh. 1.

[3] Page 2. Affid. 17.

[4] Page 3. Exh. A; Tr. 107.

that vessel, and then changed course to the right, reducing speed to slow ahead.[5] Shortly thereafter, the engine was stopped and put full astern to take aboard a compulsory state pilot from a pilot boat positioned about one-half mile N/W of the Lightship, the pilot boarding and taking the conn at about 0910, at which time the engines were on one-half ahead, wheel hard left. Present on the bridge were the master, third officer, quartermaster, lookout, deck cadet and, at various times, the first mate. "Northern Gulf" was equipped with gyro-compass repeaters on both wings of her bridge and with bearing or azimuth circles, binoculars, radar and fathometer.[6] On being advised by the master that there was no gyro error, the pilot ordered full ahead with the wheel still at hard left until the vessel reached and steadied on a heading of 315 degrees true, at which time he had Portland Light fine on the port bow and West Cod Ledge Rock Buoy No. 2 fifteen degrees on the starboard bow, with the course set to pass one-quarter mile off that buoy.[7] The vessel remained on course 315 degrees true for about twelve minutes.[8] Approaching Buoy No. 2, the engine speed was reduced to half ahead, and when that buoy was about two points forward of the starboard beam and 600 yards off, the order full right rudder was given, the indicator showing a 15-degree starboard rudder angle, the vessel requiring one to two minutes to answer the helm, and the course changing slowly to the right toward Witch Rock Buoy, the customary route for deep draft vessels.[9] The change of course

[5] Page 3. Exhs. 4 at 5; 15; 19 at 8; 21.

[6] Page 3. Tr. 46; Exh. 29; Tr. 56; Exh. 4 at 13; Exh. 15; Affid. 4; Exh. F at 35, 37–38; Exh. 18 at 16, 20; Exh. 19 at 27.

[7] Page 4. Tr. 48, 50; Exh. 29; Exh. A at 1; Affid. 5; Tr. 173; Exh. 4 at 14; Exh. 29.

[8] Page 4. Tr. 57, 118.

[9] Page 4. Exh. 21; Affid. 7; Exh. 29; Tr. 277; Tr. 58–60.

was begun at approximately 0924–0925 hours (course recorder time) with the vessel's heading changing to the right to 352 degrees true at approximately 0926½ (course recorder time) and thence to the left to 346¼ degrees true at approximately 0927 (course recorder time), at which time she was making about six knots (200 yards per minute).[10] At about 0929½ (log book time) West Cod Ledge Buoy No. 2 came abeam to starboard about 300 yards off.[11] It was about two hours before low water with the tide running at ½ knot or less in a N/W–S/W direction, wind from the N–N/W at 15 to 17 knots.[12] The vessel remained on a course of 346¼ degrees true, travelling at a speed of six knots until she stranded some time between 0930 and 0931 (0930½ course recorder time) on the westernmost shoal of West Cod Ledge with Buoy No. 2 bearing 107 degrees true about 400 yards to starboard.[13] Immediately following the stranding, the Coast Guard established that the buoy was in 75 feet of water and 350–400 yards, bearing 097¾ degrees, from its chartered position.[14] If the buoy had been on its charted position, "Northern Gulf" would have passed 350 to 400 yards to the west of her stranded position, in 80 to 90 feet of water and well clear of West Cod Ledge Rock.[15]

WEST COD LEDGE ROCK BUOY NO. 2

West Cod Ledge Rock Buoy No. 2 was established in 1914 and was maintained by defendant as a floating aid to navigation marking the position of West Cod

[10] Page 4. Affid. 8.
[11] Page 4. Exh. 12.
[12] Page 14. Tr. 131–133.
[13] Page 5. Tr. 125–127; Affid. 8.
[14] Page 5. Affid. 9.
[15] Page 5. Affid. 13; Exhs. 29 and 33; Tr. 283.

Ledge.[16] It is described in the List of Lights as located "[i]n 60 feet, south of rock east of Cape Elizabeth", a red lighted buoy with its light 12 feet above the water.[17] It seems clear that the Ledge is a hazard to deep laden vessels of the size of "Northern Gulf".[18] Nor is it disputed that on November 25, 1963, "Northern Gulf's" pilot and navigators relied on Buoy No. 2 to pass safely by West Cod Ledge Rock.[19] Official records establish that the buoys had a good history of remaining on its charted position and most pilots entering Casco Bay and Portland Harbor in deeply-laden vessels relied solely on the buoy to determine their positions with respect to West Cod Ledge Rock, to pass safely by and to make the course changes toward Witch Rock Buoy.[20] There had been no published report that the buoy was off station prior to the stranding and many deep-laden vessels had proceeded between Corwin Rock Buoy No. 3 and West Cod Ledge Rock Buoy No. 2 from December 11, 1962 and until November 25, 1963 without stranding.[21] Indeed "Northern Gulf" with the same master proceeded safely through the area on April 30, 1963.[22] Nevertheless, I find that Buoy No. 2 was off station in the general location where found at the time of the stranding, and for a period of approximately eight months prior to November 25, 1963. It is, of course, true that "mere proof of the existence of a state of facts does not raise a presumption that the same condition of facts existed at a prior date, since inferences

[16] Page 5, Affid. 2.
[17] Page 5. Exh. 17.
[18] Page 5. Affid. 2.
[19] Page 6. Affid. 21.
[20] Page 6. Affids. 2, 12.
[21] Page 6. Affids. 10, 11.
[22] Page 6. Affid. 11.

or presumptions of fact ordinarily do not run backward." *Russell, Poling & Co.* v. *Conners Standard Marine Corp.*, 252 F. 2d 167, 170 (2d Cir. 1958). However, in the instant case three Portland lobstermen testified by deposition that they discovered the buoy off its normal position in the spring of 1963 and that it was in the same position on November 25, 1963 until it was moved back on its charted position by the Coast Guard shortly after the stranding.[23] The fact that other vessels successfully traversed the area is easily explainable since the 7′ to 11′5″ tide range would permit vessels drawing more than "Northern Gulf" to pass over the very same spot at high water.[24] In contradiction to the testimony of the lobstermen, defendant failed to produce a single witness from the Portland Light Vessel, Cape Elizabeth Lightship, the buoy tender "Cowslip" or from the four Coast Guard cutters stationed in that vicinity who could say that the position of No. 2 Buoy had been checked by cross-bearings or sextant angles at any time after it was first found off station by the lobstermen in the spring of 1963 until after the stranding.[25]

While the Coast Guard "*may* establish, maintain, and operate . . . aids to maritime navigation", 14 U.S.C. § 81 (emphasis added), once it has established such aids it *shall* maintain and operate them as provided under 14 U.S.C. § 2. No other person, public body, or instrumentality, excluding the armed service, may establish, erect, or maintain any such aid without Coast Guard authorization, 14 U.S.C. § 83, or remove, change the location of, obstruct, or otherwise interfere with any aid established, installed, operated or main-

[23] Page 7. Exhs. 23, 24 and 27.
[24] Page 7. Tr. 94.
[25] Page 7. Exhs. M, N, O, S, V, X, Y.

tained pursuant to § 81. Title 14, United States Code, Section 84. Once the Coast Guard "exercised its discretion to . . . [establish a buoy at West Cod Ledge Rock] and engendered reliance on the guidance afforded by the . . . [buoy], it was obligated to use due care to make certain that the . . . [buoy] was kept in good working order." *Indian Towing Co., Inc.* v. *United States*, 350 U.S. 61, 69 (1955). If the buoy moved from its charter position, "the Coast Guard was further obligated to use due care to discover this fact and to . . . [restore it to its charted position] or give warning. . . ." *Indian Towing Co., Inc.* v. *United States, supra* at 69. Coast Guard Regulations require "[t]hat the commanding officer shall make every reasonable effort to observe and check the proper functioning of all aids to navigation within the range of his immediate area of operations. He shall inform the district commander by dispatch of any aid to navigation that is found to be *out of position* or out of order, including information as to any corrective action taken by him." C.G. 300 Par. 716; see C.F.R. Title 33 § 2.01–5. (Emphasis added.) Buoy No. 2 was 3.1 miles distant and visible from Portland Light Vessel and could have been checked either by a bearing or sextant angle, which would have revealed a 3-degree difference between the charted position and the actual position of the buoy as measured from the Light Vessel.[26] That Portland Light Vessel had responsibility to monitor Buoy No. 2 along with Cape Elizabeth Life Boat Station seems clear. Its "Aids to Navigation Operation Bill" directed that "[a]ll unattended aids to navigation, including floating aids, in the vicinity of the station shall be observed for failures or other irregularities."[27] See also First Coast

[26] Page 9. Exh. Y at 70–75.

[27] Page 9. Exh. BG.

Guard District Operations Plan—Annex K ¶ 3 and Appendix 1 to Annex K, (K-1-3,4 and K-1-63).[28] The Aids to Navigation Monitoring Bill of Cape Elizabeth Life Boat Station required the taking of range and bearing of every aid within visual range of that station at fixed intervals, and Buoy No. 2 was one of the aids specifically listed with its bearing and range.[29] A bearing taken immediately following the stranding of "Northern Gulf" from the Life Boat Station showed that Buoy No. 2 was on a nearly correct bearing from it, but the Station's commanding officer admitted he could not determine whether the buoy was on its proper station from a single bearing, although he could have done so had he also had a bearing on the buoy from Portland Light Vessel with which he was in radio contact.[30]

The buoy tender "Cowslip" had primary responsibility for monitoring Buoy No. 2 under the first Coast Guard District Operations Plan—Appendix 1 to Annex K (K-1-63).[31] She made regular logistic runs from South Portland to Portland Light Vessel, passing the buoy twice on each trip, and in fact passed it ten times between October 1, 1963 and the date of the stranding, the last time being in the morning of November 21, 1963.[32] There is no evidence that Buoy No. 2 was checked by "Cowslip" by bearings or sextant angles, and if fathometer readings were taken, as claimed, the claimed readings would not have determined that the buoy was on its charted position.[33] In fact, the fathometer readings taken by the lobster-

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[28] Page 10. Exhs. BA, BB.

[29] Page 10. Exh. BW.

[30] Page 10. Exh. N at 8, 15, 16–17.

[31] Page 10. Exh. BB.

[32] Page 10. Exh. Y at 56–57; Exh. AK.

[33] Page 11. Exh. Y at 93; Exh. CC.

men in the spring of 1963 clearly indicated the buoy was off station and were the basis for their conclusions at that time.[34]

In addition to the duties imposed upon the Portland Light Vessel, Portland Life Boat Station and "Cowslip," similar duties were imposed on other Coast Guard vessels operating within range of their immediate area of operations.[35] The Coast Guard cutters "Acushnet," "Barattaria," "Coos Bay" and "Cook Inlet," based in Portland, regularly passed in and out of Portland Harbor, yet defendant failed to produce a single witness from these cutters who could say that the position of Buoy No. 2 had been checked by cross-bearings or sextant angles at any time after the spring of 1963 until after the stranding of "Northern Gulf."[36]

It seems clear that, after Buoy No. 2 was reset by "Cowslip" after breaking loose from its mooring in December 1962, the Coast Guard personnel who were responsible for checking its position failed to use the means readily available to make certain that it was on its charted position, or to discover that it was off its charted position. In view of the length of time during which it was off station, the continued surveillance of the immediate area by Coast Guard personnel, the distance it was off station, the available means of discovery, the obvious importance of the buoy, and the clear mandate of statute and regulations, defendant must be held to have had constructive notice, and its failure to act amounts to actionable negligence. *Indian Towing Co., Inc.* v. *United States, supra; Russell, Poling & Co.* v. *Conners Standard Marine Corp., supra; Chesapeake & O. Ry.* v. *United States,*

[34] Page 11. Exhs. 23, 24 and 27.

[35] Page 11. Exh. BB.

[36] Page 11. Exhs. J. K, L, M, T, W, X, Y.

1964 A.M.C. 2651 (E.D. Mich.), *amended,* 1966 A.M.C. 1883 (E.D. Mich. 1962) (not otherwise reported).

LIABILITY OF NORTHERN GULF FOR NAVIGATIONAL ERRORS

It is, of course, defendant's contention that it was not negligent in so far as the situation of Buoy No. 2 is concerned, and that even if such displacement occurred for any length of time prior to the stranding that would merely have been a condition and not a cause of the stranding. *Crawford* v. *Indian Towing Co., Inc.,* 240 F.2d 308, 311 (5th Cir.), *cert. denied,* 353 U.S. 958 (1957); *P. Dougherty Co.* v. *United States,* 207 F.2d 626, 631–32 (3d Cir. 1953), *cert. denied,* 347 U.S. 912 (1954). In support of this proposition, defendant contends that the sole cause of the stranding of "Northern Gulf" was the improper navigation of that vessel by the pilot and crew. Of course, stranding on a well-known and fully-charted reef in itself raises a presumption of negligence and fault. However, liability is based on "fault," and the fault that is to produce liability must be not mere fault in the abstract, but fault that is a contributory cause of the stranding. Where a vessel has been guilty of a statutory fault, a drastic and unusual presumption arises under the so-called "Pennsylvania" rule, *The Pennsylvania,* 86 U.S. (19 Wall.) 125 (1873), whereunder the vessel thus cast in fault must prove, to escape liability, not only that the fault shown probably did not, but also that it *could not* have contributed to causing the accident. However, it is only statutory fault that invokes the "Pennsylvania" rule. A ship which is at fault in some other regard, that is, for example, guilty of negligence by general standards, still has the benefit of the usual rule placing the burden of proof of causal connection upon the one as-

serting negligence. *Oriental Trading & Transp. Co., Ltd.* v. *Gulf Oil Corp.*, 173 F.2d 108, 110 (2d Cir.), *cert. denied, Gulf Oil Corp.* v. *The John A. Brown*, 337 U.S. 919 (1949). In determining the existence of statutory fault, it is necessary to determine whether the particular statute alleged to have been violated is mandatory in form, or whether it is merely some evidence of a standard of care to be exercised in navigation. *Home Shipping Co., S.A.* v. *United States*, 239 F. Supp. 226, 230 (D. Del. 1965), *aff'd*, 359 F.2d 435 (3rd Cir.), *cert. denied*, 385 U.S. 930 (1966). Furthermore, we are not dealing here with a rule of navigation designed to prevent collision.

Defendant's contention is that "Northern Gulf's" pilot navigated solely by "seaman's eye" and relied upon Buoy No. 2 being on its charted position rather than upon fixes from bearings on appropriate landmarks in the form of aids to navigation. There were several fixed landmarks, which were aids to navigation and visible to "Northern Gulf's" pilot and navigators as she proceeded from the Portland Lightship to West Cod Ledge Buoy No. 2. Such aids to navigation were Cape Elizabeth (distant 5.3 miles from Portland Lightship and distant 3.1 miles from Buoy No. 2), Portland Head Lighthouse (distant 7.6 miles from the Lightship and distant 4.6 miles from Buoy No. 2), Half-way Rock (distant 8.1 miles from the Lightship and distant 6.4 miles from Buoy No. 2) and Ram Island (distant 7.5 miles from the Lightship and distant 4.4 miles from Buoy No. 2).[37] Defendant contends that had the pilot taken fixes on two or more of the aforementioned landmarks he would have determined that his position based on a bearing on Buoy No. 2 as charted did not correspond with the fix and,

[37] Page 15. Affid. 12.

accordingly, this would have indicated to him that the buoy was off station. For legal support of its position, defendant cites 33 C.F.R. § 62.25–55 which bears the title "Caution" and reads, in pertinent part, as follows:

> "(a) Buoys are liable to be carried away, shifted, capsized, sunk, etc.; lighted buoys may be extinguished or sound buoys may not function as the result of storm, the accumulation of ice, running ice or other natural causes, collision or other accident.
>
> "(b) For the foregoing reasons, mariners should not rely *completely* upon the position or operation of floating aids to navigation, but should *also* utilize bearings from fixed objects and aids to navigation on shore." (Emphasis added.)

Defendant also makes reference to the cautionary notes concerning aids to navigation contained in the Introduction to the List of Lights and Other Marine Aids—Atlantic Coast,[38] more specifically to the statement relative to Buoys at page X thereof, which reads, in pertinent part, as follows:

> "It is imprudent for a navigator to rely on floating aids to navigation to always maintain their chartered positions and to constantly and unerringly display their advertised characteristics. The obstacles to perfect performance are of such magnitude that complete reliability is manifestly impossible to achieve. Buoys are liable to be carried away, shifted, capsized, or sunk as the result of storms, ice conditions, collisions, or other accident. Lighted buoys may become extinguished or their lighting apparatus broken or deranged causing them to show im-

[38] Page 16. Exh. 17.

proper light colors or light phase characteristics. . . .

Buoys are moored to scopes of chain of various lengths, and in some cases several times the depth of the water in which they are located. Like the "Lightship," the radius of swing should be taken into account.

The position of a buoy, as shown on the chart, actually represents the location of its sinker to which the mooring chain is shackled. The buoy, however, does not maintain position directly over its sinker. . . .

All buoys should, therefore, be regarded as warnings or guides and not as infallible navigation marks; especially those located in exposed positions. Whenever possible, a ship should be navigated by bearings or angles on fixed objects on shore and by soundings, rather than by reliance on buoys." (Emphasis in original.)

Defendant also quotes from B. Dutton, Navigation and Nautical Astronomy 141 (6th ed. 1939), under the heading "Piloting";[39]

"*Buoys* do not always maintain exact positions; therefore, they should always be regarded as warnings and not as fixed navigational marks, especially during the winter months or when moored in exposed waters. A vessel's position should, when possible, be plotted not by buoys, but by bearings or by angles of fixed objects on shore."

Plaintiff, in turn, refers to the U.S. Coast Guard publication, "Buoys in Water of the United States" (1942), which was "prepared primarily for instruction work and is not intended to replace the Light Lists, Coast Pilots, and Charts dealing with the subject", and refers to the first paragraph on page 2 of

[39] Page 17. Exh. 35A.

the publication under the heading "The Significance of Buoys", which reads as follows: [40]

> "The primary function of buoys is to warn the mariner of some danger, some obstruction, or change in the contours of the sea bottom, and to delineate the channels leading to various points, that he may avoid the dangers and continue his course safely. *The utmost advantage is obtained from buoys when they are considered as marking definitely identified spots, for if a mariner knows his precise location at the moment and is properly equipped with charts, he can readily plot a safe course on which to proceed.* Such features as size, shape, coloring, numbering and signalling equipment of buoys, are but means to these ends of warning, guiding, and orienting." (Emphasis added.)

However, of the foregoing quoted authorities, only 33 C.F.R. § 62.25–55 has the force of law. 44 U.S.C. § 301 *et seq.*: *Rowe* v. *Brooks,* 329 F.2d 35, 42 (4th Cir. 1964); *Home Shipping Co., S.A.,* v. *United States, supra.* And even if the cautionary language can be considered a regulation, it can scarcely be construed as prohibiting or mandating any particular conduct sufficient to invoke the drastic "Pennsylvania" rule. In none of the authorities relied upon by defendant is the prudent navigator forbidden to rely on buoys—rather, he is cautioned not to rely on buoys alone where additional means of fixing his position are available. Indeed, there is authority for the proposition that pilots have the right to rely on buoys. *The Clevelander,* 83 F.2d 947, 949 (2d Cir. 1936); *Trinidad Corp.* v. *S. S. Sister Katingo,* 280 F. Supp. 976, 977 (S.D.N.Y. 1967); *Chesapeake & Ohio Ry.* v. *United States, supra.* The cases cited by defendant are clearly distinguishable from the instant case, since

[40] Page 17. Exh. 30.

they either involved a failure to use readily available ranges or range lights, or outages of light buoys which should have alerted the pilot to the fact that he was proceeding into danger.[41]

There were no range available to the pilot of "Northern Gulf," certainly not on his course from the Lightship to the vicinity of Buoy No. 2.[42] The pilot had no reason to suspect that the buoy was off its charted position and knew that the buoy was in constant view of Coast Guard units who were re-

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[41] Page 17. *Standard Dredging Corp.* v. *S.S. Syra*, 1968 A.M.C. 2235, 2239 (D. Md. 1968) [not otherwise reported] (Radio and written notice of relocation of buoy given. Master did not determine his position by reference to range lights, "which are recognized as the most reliable means of ascertaining one's position"); *Philadelphia Elec. Co.* v. *Curtis Bay Towing Co.*, 260 F. Supp. 505 (E.D. Pa. 1966), *aff'd*, 390 F. 2d 125 (3rd Cir. 1968) (Two fixed range lights maintained by Coast Guard on markers visible in daytime to show navigator his course. Buoy 225 feet off station in channel 1,000 feet wide. Pilot took no bearing on or observation of buoy before standing); *Canada S.S. Lines, Ltd.* v. *Great Lakes Dredge & Dock Co.*, 81 F. 2d 100 (7th Cir. 1936) (Failure to use government range lights); *The Manhattan*, 3 F. Supp. 75 (E.D. Pa. 1932), *aff'd per curiam*, 63 F. 2d 995 (3rd Cir. 1933) (Failure to follow the ranges); *The Miles Standish*, 1928 A.M.C. 215, 216 (S.D. N.Y. 1919), [not otherwise reported] (The Channel was "known, not only by buoys, but by courses or ranges which would serve to correct the position of the buoys"); *The Somers N. Smith*, 120 Fed. 569 (D. Me. 1903) (Failure to follow rangeway in narrow channel); *The Bella Dan*, 1968 A.M.C. 900, 908 (4th Cir. 1968) [not otherwise reported] (Failure to post lookout "who could have observed the *Bella Dan's* divergence from the line of channel buoys"). See also *Dibble* v. *United States*, 1968 A.M.C. 1557 (N.D. Ill. 1968) [not otherwise reported] (Failure to use range lights); *United States* v. *Sigfridson*, 1964 A.M.C. 2341 (D. Ore. 1963) (Failure to use range lights).

[42] Page 19. Tr. 94, 261; Exh. 29.

quired to check its position.[43] It was not unreasonable for him to expect that the Coast Guard would warn him if the buoy was off its charted position. As stated in *Casement* v. *Brown,* 148 U.S. 615, 627 (1893):

> "[I]t would be placing too severe a condemnation on the conduct of the pilots in charge of the boats, to say that their error of judgment, their dependence on the appearance of the stream, and *their reliance upon the duty of the defendants to place suitable buoys or other warnings,* was such contributory negligence as would relieve the defendants from liability for the results of their almost confessed, and certainly undoubted, negligence." (Emphasis added.)

"Northern Gulfs" pilot had received no reports from any source warning him that Buoy No. 2 was off its charted position, nor was there any weather for a period of at least two months prior to the stranding which would have affected the position of the buoy.[44]

Defendant's contention that the fact that the buoy was off its charted position was merely a condition and not the cause of the stranding is without merit. It seems abundantly clear that if the buoy had been on its charted position "Northern Gulf" would have passed 350–400 yards to the west of her stranded position in 80–90 feet of water and well clear of West Cod Ledge Rock. The fault of the Coast Guard in failing to maintain Buoy No. 2 on its charted position is established as the sole proximate cause of the stranding of "Northern Gulf." As was stated in *The City of New York,* 147 U.S. 72, 85 (1893):

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[43] Page 19. Exhs. BA, BB, BG, BW; Tr. 78–79, 163.

[44] Page 19. Affid. 10; Exh. 3; Tr. 80.

> "Where fault on the part of one vessel is established by uncontradicted testimony, and such ault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

Defendant's attempt to show that navigational errors on the part of "Northern Gulf's" pilot contributed to the stranding, while understandable, cannot withstand careful analysis.[45] It is apparent that if Buoy No. 2 had been on its charted position "Northern Gulf's" course change would not have started until she was one-quarter mile farther to the northwest and she then would have passed clear of West Cod Ledge. There is no evidence to support an argument that the pilot was, or should have been, aware that he was proceeding into danger. Even if cross-bearings or radar ranges had been taken and plotted by those on "Northern Gulf" while proceeding on the 315-degree course, they would have shown that "Northern Gulf" was on a safe course to pass clear of West Cod Ledge Rock. The swing of the ship after the course change was started at Buoy No. 2 and the short period of time after she steadied up on her new course precluded a running fix of the vessel's position in time to avoid the stranding. Nor does it appear likely that the pilot,

[45] Page 20. A finding of contributory negligence, however slight, on the part of plaintiff would result in the imposition of equal liability and, in effect reduce defendant's liability by one-half. *Dwyer Oil Transport Co., Inc.* v. *The Edna M. Matton*, 255 F. 2d 380 (2d Cir.), *cert. denied*, 358 U.S. 838 (1958); *Russell, Poling & Co.* v. *United States*, 140 F. Supp. 890 (S.D.N.Y. 1956).

had he been able to obtain a running fix, would have had the opportunity, in view of the time the vessel required to answer the helm, to avoid the imminent danger. Moreover, defendant's contention that the pilot should have made continual fixes of his posifion should be viewed in the light of its statement in its reply brief directed, of course, to the clearly established failure of defendant to fix the position of Buoy No. 2. According to defendant, to do what it would have the pilot of "Northern Gulf" do would obviously be impractical so far as the Coast Guard was concerned.[46]

The vessel was adequately fitted out with charts, publications, and navigation instruments. There is no evidence that the master, crew or compulsory pilot were incompetent or that the master should have interfered with the pilot's navigation. Even if a running fix might have alerted the pilot that the buoy was off position in time for effective action to have been taken, we are cautioned by the Supreme Court against judgment by sternsight:

> "Whether she [the innocent ship] may not have been slightly in fault may be a close question. This is often so when *subsequent* knowledge of what might have prevented disaster tends to qualify the inquiry as to the prior duty to avert it." *The Victory & The Plymothian,* 168 U.S. 410, 424 (1897). (Emphasis added.)

Accordingly, I find the defendant solely liable for the stranding of "Northern Gulf" and the resultant damages. Submit proposed findings of fact and conclusions of law in conformity herewith, including such findings of fact as have already been agreed upon. An interlocutory judgment will thereafter be entered, and the parties thereafter will be given sixty

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[46] Page 22. Defendant's Reply Brief at 6.

(60) days to agree upon the damages properly to be awarded or, failing such agreement, that issue will be set down for trial or, upon a proper showing as required by Rule 53(b) of the Federal Rules of Civil Procedure, the determination of damages will be referred to a Special Master.[47]

Dated: NEW YORK, NEW YORK, AUGUST 26, 1969.

CHARLES H. TENNEY,
United States District Judge.

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[47] Page 23. See *Federazione Italiana Dei Corsorzi Agrari v. Mandask Compania de Vapores, S.A.*, 388 F. 2d 434, 440 (2d Cir.), *cert. denied*, 393 U.S. 828 (1968).

APPENDIX E

United States District Court, Southern District of New York

No. AD. 249

AFRAN TRANSPORT COMPANY, AS OWNER OF THE STEAMSHIP "NORTHERN GULF," PLAINTIFF,

against

UNITED STATES OF AMERICA, DEFENDANT.

No. 64 AD. 421

BRITISH AMERICAN OIL CO., LTD., PLAINTIFF,

against

UNITED STATES OF AMERICA, DEFENDANT,

and

S. S. NORTHERN GULF AND AFRAN TRANSPORT COMPANY, CLAIMANT-THIRD PARTY DEFENDANT.

TENNY, J. The Court, having rendered an opinion herein on August 26, 1969, which opinion was filed on August 27, 1969, now makes the following findings of fact and conclusions of law, pursuant to Rule 52 of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

1. On the morning of November 25, 1963, the tanker "Northern Gulf", a single screw super-tanker of 696′ 4″ overall length, 90′ 6″ breadth, and 48′ depth, owned by Afran Transport Company, on a voyage from Bandar, Mashur, to Portland, Maine, with a cargo of crude oil and a draft of 35′ 6″ forward and aft, passed Portland Lightship at about 0900 hours. (Agreed Finding No. 1, Tr. 3–4).

2. At the time of the stranding of the "Northern Gulf," she was laden with libellant's British American Oil Co., Ltd., cargo of approximately 261,429 US barrels of Iranian crude oil destined for the Canadian Pipeline dock at Portland, Maine, for delivery to libellant as consignee. (Agreed Finding No. 17, Tr. 7–8).

3. The weather was clear, visibility good (9 to 10 miles), wind moderate N/W, tide last of ebb.

4. On course 276° true, she brought the Lightship abeam 700 yards off her port side, fixing the position with a radar range and visual bearing on that vessel, and then changed course to the right, reducing speed to slow ahead.

5. A compulsory pilot came aboard at 0910 hours, thereafter directing "Northern Gulf's" navigation. "Northern Gulf's" engines were then on half ahead and the wheel hard left.

6. He boarded from a pilot boat stationed about ½ mile N/W of the Lightship.

7. Also on the bridge were her master, third officer, quartermaster, lookout and deck cadet (Agreed Finding No. 4, Tr. 4) and, at various times, the first mate.

8. "Northern Gulf" was equipped with gyro-compass repeaters on both wings of her bridge and with

bearing or azimuth circles, binoculars, radar and fathometer.

9. On being advised that there was no gyro error, the pilot ordered full ahead with the wheel still at hard left.

10. Under the pilot's orders she was put on course 315° true, intending to pass about ¼ mile off West Cod Ledge Rock Buoy No. 2, (Agreed Finding No. 5, Tr. 4), at which time he had Portland Head Light fine on the port bow and West Cod Ledge Rock Buoy No. 2, 15° on the starboard bow.

11. The vessel remained on course 315° true for about 12 minutes.

12. At 0927 hours, before bringing Buoy No. 2 abeam, the engine speed was reduced from full to half ahead. (Agreed Finding No. 6, Tr. 4).

13. In the vicinity of Buoy No. 2 the vessel's course was altered to the right toward Witch Rock Buoy, the customary route for deep draft vessels. (Agreed Finding No. 7, Tr. 4–5). The Buoy was 2 points forward of the starboard beam and 600 yards off when the order right rudder was given, the indicator showing a 15° starboard rudder angle, the vessel requiriing 1 to 2 minutes to answer the helm, and the course changing slowly to the right toward Witch Rock Buoy.

14. Shortly after that course change, "Northern Gulf" stranded on West Cod Ledge Rock, although Buoy No. 2, supposedly marking the Rock, was 350 to 400 yards off "Northern Gulf's" starboard side. The change of course was begun at approximately 0924–0925 hours (course recorder time) with the vessel's heading changing to the right to 352° true at approximately 0926–½ (course recorder time) and thence back to the left to 346–¼° at approximately 0927 hours (course recorder time) upon which course the vessel remained until the time of the stranding.

The vessel was traveling at a speed of about 6 knots (200 yards per minute) from 0927 hours (bell book time) until stranding. (Agreed Finding No. 8, Tr. 5).

15. At about 0929–½ (log book time). West Cod Ledge Buoy No. 2 came abeam to starboard about 300 yards off. It was about 2 hours before low water with the tide running at ½ knot or less in a N/W–S/W direction, wind from the N–N/W at 15 to 17 knots.

16. The vessel remained on a course of 346–¼° true, traveling at a speed of 6 knots until she stranded sometime between 0930 and 0931 (0930–½) (course recorder time) on the westernmost shoal of West Cod Ledge with Buoy No. 2 bearing 107° true about, 400 yards to starboard.

17. Thereafter it was determined by the Coast Guard cutters "Acushnet" and "Cowslip" that Buoy No. 2 actually was located 350 to 400 yards, bearing 097–¾° from its charted position. (Agreed Finding No. 9, Tr. 5).

18. The position of the "Northern Gulf" was 350 to 400 yards to the eastward of where she would have been if Buoy No. 2 had been on its charted position. (Agreed Finding No. 13, Tr. 7).

19. West Cod Ledge Rock Buoy No. 2 was established in 1914 and was maintained by the United States of America as a floating aid to navigation marking the position of West Cod Ledge. The Ledge is a hazard to deep laden vessels of the size of the "Northern Gulf." Official records established that the Buoy had a good history of remaining on its charted position. (Agreed Finding No. 2, Tr. 4).

20. There were several fixed landmarks, which were aids to navigation and visible to "Northern Gulf's" pilot and navigators as she proceeded from the Portland Lightship to West Cod Ledge Buoy No. 2. Such aids to navigation were Cape Elizabeth (distant 5.3

miles from Portland Lightship and distant 3.1 miles from Buoy No. 2), Portland Head Lighthouse (distant 7.6 miles from the Lightship and distant 4.6 miles from Buoy No. 2), Half-way Rock (distant 8.1 miles from the Lightship and distant 6.4 miles from Buoy No. 2), Ram Island (distant 7.5 miles from the Lightship and distant 4.4 miles from Buoy No. 2). Most of the pilots entering Casco Bay and Portland Harbor in deeply laden vessels relied solely on the Buoy to determine their positions with respect to West Cod Ledge Rock, to pass safely by and to make the course changes toward Witch Rock Buoy. (Agreed Finding No. 12, Tr. 6–7).

21. West Cod Ledge Rock Buoy No. 2 is described in the List of Lights as located "[i]n 60 feet; south of rock east of Cape Elizabeth, a red lighted buoy" with its light 12′ above the water.

22. "Northern Gulf's" pilot and navigators relied on Buoy No. 2 to pass safely by West Cod Ledge Rock. (Agreed Finding No. 21, Tr. 74).

23. There had been no published report that the Buoy was off station prior to the stranding. (Agreed Finding No. 10, Tr. 6).

24. Many deep laden vessels had proceeded between Corwin Rock Buoy No. 3 and West Cod Ledge Rock Buoy No. 2 from December 11, 1962 and until November 25, 1963 without stranding. The "Northern Gulf," with the same master, proceeded safely through the area on April 30, 1963. (Agreed Finding No. 11, Tr. 6).

25. Buoy No. 2 was off station in the general location where found at the time of stranding for a period of approximately 8 months prior to November 25, 1963. Three Portland lobstermen discovered the Buoy off its normal position in the spring of 1963 and that it was in the same position on November 25, 1963

until it was moved back on its charted position by the Coast Guard shortly after the stranding.

26. Buoy No. 2 was 3.1 miles distant and visible from Portland Light Vessel and could have been checked either by a bearing or sextant angle, which would have revealed a 3° difference between the charted position and the actual position of the Buoy as measured from the Light Vessel.

27. Portland Light Vessel had responsibility to monitor Buoy No. 2 along with Cape Elizabeth Life Boat Station.

28. The Commanding Officer of the Cape Elizabeth Life Boat Station could have determined whether the Buoy was on its proper station had he a bearing on the Buoy taken from Portland Light Vessel with which he was in radio contact.

29. The buoy tender "Cowslip" had primary responsibility for monitoring Buoy No. 2. It made regular logistic runs to Portland Light Vessel, passing the Buoy twice on each trip and passed it 10 times between October 1, 1963 and on the date of the stranding, the last time being in the morning of November 21, 1963.

30. The position of Buoy No. 2 was not checked by the "Cowslip" by bearings or sextant angles.

31. The fathometer readings claimed to have been taken by the "Cowslip" would not have determined that the Buoy was on its charted position.

32. Fathometer readings taken by the lobstermen in the spring of 1963 clearly indicated the Buoy was off station.

33. The position of Buoy No. 2 had not been checked by the Coast Guard by cross-bearings or sextant angles anytime after the spring of 1963 until after the stranding of the "Northern Gulf."

34. After Buoy No. 2 was reset by "Cowslip" after breaking loose from its mooring in December 1962, the Coast Guard personnel who were responsible for checking its position failed to use the means readily available to make certain that it was on its charted position, or to discover that it was off its charted position.

35. There were no ranges available to the pilot of "Northern Gulf" on his course from the Lightship to the vicinity of Buoy No. 2.

36. The pilot had no reason to suspect that the Buoy was off its charted position and knew that the Buoy was in constant view of Coast Guard units who were required to check its position. It was not unreasonable for him to expect that the Coast Guard would warn him if the Buoy was off its charted position.

37. "Northern Gulf's" pilot received no reports from any source warning him that Buoy No. 2 was off its charted position, nor was there any weather for a period of at least 2 months prior the stranding which would have affected the position of the Buoy.

38. If the Buoy had been on its charted position, "Northern Gulf" would have passed 350–400 yards to the west of her stranded position in 80–90′ water and well clear of West Cod Ledge Rock and her course change would not have started until she was ¼ mile farther to the northwest and she then would have passed clear of West Cod Ledge.

39. Even if cross-bearings or radar ranges had been taken and plotted by those on "Northern Gulf" while proceeding on the 315° course, they would have shown that "Northern Gulf" was on a safe course to pass clear of West Cod Ledge Rock.

40. The swing of the ship after the course change was started at Buoy No. 2 and the short period of time after she steadied up on her new course precluded a

running fix of the vessel's position in time to avoid the stranding.

41. The "Northern Gulf" was adequately fitted out with charts, publications, and navigation instruments; her compulsory pilot, master and crew were competent and there is no evidence to show that the master should have interfered with the pilot's navigation.

42. The "Northern Gulf" sustained damage and loss of cargo as a result of the stranding and large areas of the Maine coast were contaminated by the spill. (Agreed Finding No. 14, Tr. 7).

43. Libellant Afran Transport Company was at all material times a corporation organized and existing under and by virtue of the laws of Liberia and owner of the S.S. "Northern Gulf." (Agreed Finding No. 16, Tr. 7).

44. The laws of the Republic of Liberia permit a citizen of the United States of America to sue the Liberian Government in its courts. (Agreed Finding No. 15, Tr. 7).

45. At all material times, libellant, British American Oil Company Co., Ltd., was the owner of said cargo of oil. (Agreed Finding No. 18, Tr. 8).

46. Libellant, British American Oil Co., Ltd., was at all material times a corporation organized and existing under and by virtue of the laws of Canada. (Agreed Finding No. 20, Tr. 8).

47. The laws of Canada permit a citizen of the United States of America to sue the Canadian Government in its courts. (Agreed Finding No. 19, Tr. 8).

CONCLUSIONS OF LAW

1. These are actions in admiralty for which a remedy is provided under the Suits in Admiralty Act, as amended in 1960, 46 U.S.C. § 741, et seq.

2. Interest is allowable on any damages that may be awarded from the dates that suits were filed, 46 U.S.C. § 743; *Petition of Oskar Tiedemann & Co.*, 236 F. Supp. 895, 910 (D. Del. 1964).

3. While the Coast Guard "may establish, maintain, and operate . . . aids to maintain navigation", 14 U.S.C. § 81, once it has established such aids it shall maintain and operate them as provided under 14 U.S.C. § 2.

4. No other person, public body, or instrumentality, excluding the armed service may establish, erect, or maintain any such aid without Coast Guard authorization, 14 U.S.C. § 83, or remove, change the location of, obstruct, or otherwise interfere with any aid established, installed, operated or maintained pursuant to § 81. Title 14, United States Code, Section 84.

5. Once the Coast Guard exercised its discretion to establish a buoy at West Cod Ledge Rock and engendered reliance on the guidance afforded by the buoy, it was obligated to use due care to make certain that the buoy remained in its charted position. *Indian Towing Co., Inc.* v. *United States*, 350 U.S. 61, 69 (1955):

6. If the buoy moved from its charted position, the Coast Guard was further obligated to use due care to discover this fact and to restore it to its charted position or give warning that it was off its charted position. *Indian Towing Co., Inc.* v. *United States*, *supra* at 69.

7. Portland Light Vessel, Portland Life Boat Station, buoy tender "Cowslip," and Coast Guard cutters "Achushnet," "Barattaria," "Coos Bay" and "Cook Inlet" all had a similar duty to check the position of West Cod Ledge Rock Buoy No. 2.

8. The length of time during which West Cod Ledge Rock Buoy No. 2 was off station, the continued surveillance of the immediate area by Coast Guard per-

sonnel, the distance it was off station, the available means of discovery, the obvious importance of the buoy, and the clear mandate of statute and regulations is constructive notice to defendant that Buoy No. 2 was off its charted position and its failure to act amounts to actionable negligence. *Indian Towing Co., Inc.* v. *United States, supra; Russel, Poling & Co.* v. *Conners Standard Marine Corp.*, 252 F. 2d 167, 170 (2 Cir. 1958); *Chesapeake & O. Ry.* v. *United States*, 1964 A.M.C. 2651 (E.D. Mich.), amended 1966 A.M.C. 1883 (E.D. Mich. 1962) (not otherwise reported)

9. Liability is based on fault, and the fault that is to produce liability must be not mere fault in abstract, but fault that is a contributory cause of the stranding. Negligence by general standards, still has the benefit of the usual rule placing the burden of proof of casual connection upon the one asserting negligence. *Oriental Trading & Transp. Co., Ltd.* v. *Gulf Oil Corp.*, 173 F. 2d 108, 110 (2 Cir.) cert. denied; *Gulf Oil Corp.* v. *The John A. Brown*, 337 U.S. 919 (1949).

10. In determining the existence of statutory fault, it is necessary to determine whether the particular statute alleged to have been violated is mandatory in form, or whether it is merely some evidence of a standard of care to be exercised in navigation. *Home Shipping Co., S.A., v. United States*, 239 F. Supp. 226, 230 (D. Del. 1965), aff'd 359 F. 2d 435 (3 Cir.), cert. denied, 385 U.S. 930 (1966).

11. The cautionary language contained in 33 C.F.R. § 62.25–55 is not a rule of navigation designed to prevent collision and does not prohibit or mandate any particular conduct sufficient to invoke the drastic "Pennsylvania" rule, *The Pennsylvania*, 86 U.S. (19 Wall.) 125 (1873).

12. "Northern Gulf's" pilot had the right to rely on West Cod Ledge Rock Buoy No. 2. *The Clevelander*,

83 F.2d 947, 949 (2d Cir. 1936); *Trinidad Corp.* v. *S.S. Sister Katingo,* 280 F. Supp. 976, 977 (S.D.N.Y. 1967); *Chesapeake & O. Ry.* v. *United States, supra.*

13. The fault on the part of the Coast Guard is established by the uncontradicted testimony and such fault is of itself sufficient to account for the stranding of "Northern Gulf." It is not enough for the defendant to raise a doubt with regard to the management of "Northern Gulf." There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of "Northern Gulf's" conduct should be resolved in its favor. *The City of New York,* 147 U.S. 72, 85 (1893).

14. The defendant is solely liable for the stranding of NORTHERN GULF and the resultant damages.

Dated: NEW YORK, NEW YORK, OCTOBER 2, 1969.

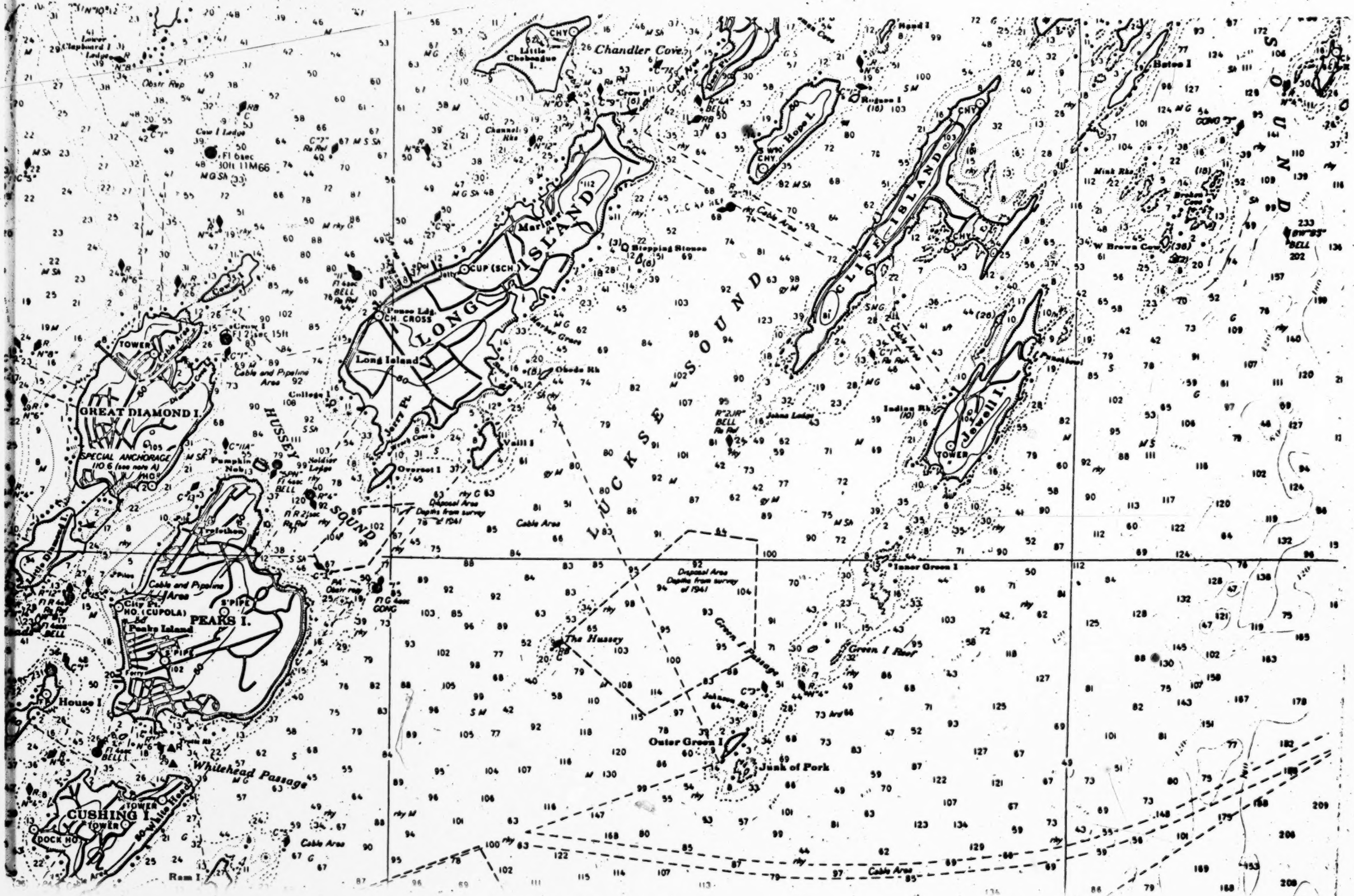
CHARLES H. TENNEY,
United States District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1971

Presumpscot River
SCALE OF MILES
Portland
South Portland
Great Diamond I.
Peaks Island
Cushing I.
Long Island
Chandler Cove
Hussey Sound
Whitehead Passage
Green I Passage
Cliff Island
Outer Green I
Junk of Pork
Ram I.
Halfway Rk
Pomroy Rk
Diamond I Ledge
Diamond I Roads
Special Anchorage 110 6 (see note A)
Cable and Pipeline Area
Cable Area
Disposal Area
Depths from survey of 1961
Fl 4sec BELL
Fl R 2sec 30ft
Fl 2sec 15ft
Fl 4sec 55ft
Fl 13M BELL
Gp Fl (2) 10sec 27ft 14M
Fl 4sec GONG
Fl R 4sec BELL
Fl 4sec BELL
Fl R 2sec BELL
Fl 2sec BELL
Fl 4sec
Fl R 4sec
Fl G 4sec
Fl R 2sec
Fl 2sec

PLAINTIFF'S EXHIBIT 33

APPENDIX F



SOUTH PORTLAND
Knightville
Cable Area
Maiden Cove
Cape Cottage
Portland Head
Fl 3 sec 101ft 16M
HORN
Delano Park
STONE TOWER
Chimney Rk
Pond Cove
Cape Elizabeth
marsh
Whale Back
Trundy Rock
Trundy Pt.
Broad Cove
Shore Acres Hill
Great Pond
grass
CAPE ELIZABETH
Maxwell Pt.
Stephen Pt.
Gp Fl (6) 30sec
129ft 17M
HORN
TOWER
Aband. Lt. Ho.
Dyer Pt.
Crescent Beach
Little Pond
Jordan Pt.
McKenney Pt.
High Head
Taylor Rock
Richards Pond
Fort Pt.
Pond Cove
Broad Cove Rk
"C" 5BC 40
Ro Rad
Whale Back
Trundy Rock
Pebble
Trundy Pt.
Stephen Cove
Maxwell Pt.
Mitchell Rk
Pine Tree Ledge
Jordan Rock
Willard Rk
Wilson Rk
Ram I.
Ram I. Ledge
Gp Fl (2) 10sec
37ft 14M
BELL
CUSHING I.
Town
TOWER
Bowditch Head
DOCK HO
Cable Area
Deposit Area
Depths from survey of 1941
Jordan Rock
Pine Tree Ledge
Willard Rk
Wilson Rk
Mitchell Rk
West Old Ledge Rk
"2"
Fl R 4sec
Fl G 4sec BELL
Fl 4sec BELL
Fl 4sec GONG
Willard Rk
Fl R 4sec BELL
Qk Fl R WHIS Ro Rad
Qk Fl R BELL Ro Rad
Fl R 4sec BELL Ro Rad
Ro Rad
Ro Rad

CUSHING I.
TOWER
DOCK HO
Cable Area
Ram I.
Ram I Ledge
Gp Fl (2) 10sec
37ft 14M
50BELL
Cable Area
Head
ft 16M
HORN
Chimney Rk
(chart) 325)
Pine Tree Ledge
Jordan Reef
Willard Rk
Broad Cove
Broad Cove Rk
Cable Area
Mitchell Rk
ELIZABETH
Stapleton Pt.
Gp Fl (6) 30sec
129ft 17M
HORN
TOWER
Aband. Lt. Ho.
High Head
Taylor Rock
Deposit Area
Depths from survey of 1941
Cable Area
Wilson Rk
Jordan Reef
Cable Area
West Cod Ledge Rk
FIR 4sec
FIG 4sec BELL
Cable Area
Becke Rk
Bulwark Shoal
C O D L E D G E
W E S T C O D
A C A S C O

Pond Cove
Cape Elizabeth
marsh
Pulpit Rk
Whale Back
Trundy Rd
Pebble Pt
Trundy Pt
Broad Cove
Broad Cove Rk
Lewis Pt
Shore Acres Hill
Great Pond
grass
Cable Area
Maxwell Pt
CAPE ELIZABETH
Staples Pt
Gp Fl (6) 30sec
120ft 17M
HORN
TOWER
Aband. Lt. Ho.
Dyer Pt
Richards Pond
Crescent Beach
Little Pond
marsh
Jordan Pt
Fort Pt
McKennet Pt
High Head
Taylor Rock
Middle Rk
Seal Rk
The Brothers
Richmond I Hbr
Richmond I.
Broad Cove
Watts Pt
Watts Ledge
Clam Cove
West Ledge
Adams Head
Old Anthony Rk
"22" Fl 4sec WHIS
(chart 231)
(CONTINUED ON CHART 231)
Mitchell Rk
West Chd Ledge Rk
R "2" Fl R 4sec
Cerwin Rk
Fl G 4sec BELL
Alden Rk
N "2AR"
East Hue and Cry
West Hue and Cry
WEST CHANNEL
15'
10'

15th Ed., June 10/68

315

PRICE $1.00

Plaintiff's Exhibit 33

Nautical Miles

Yards

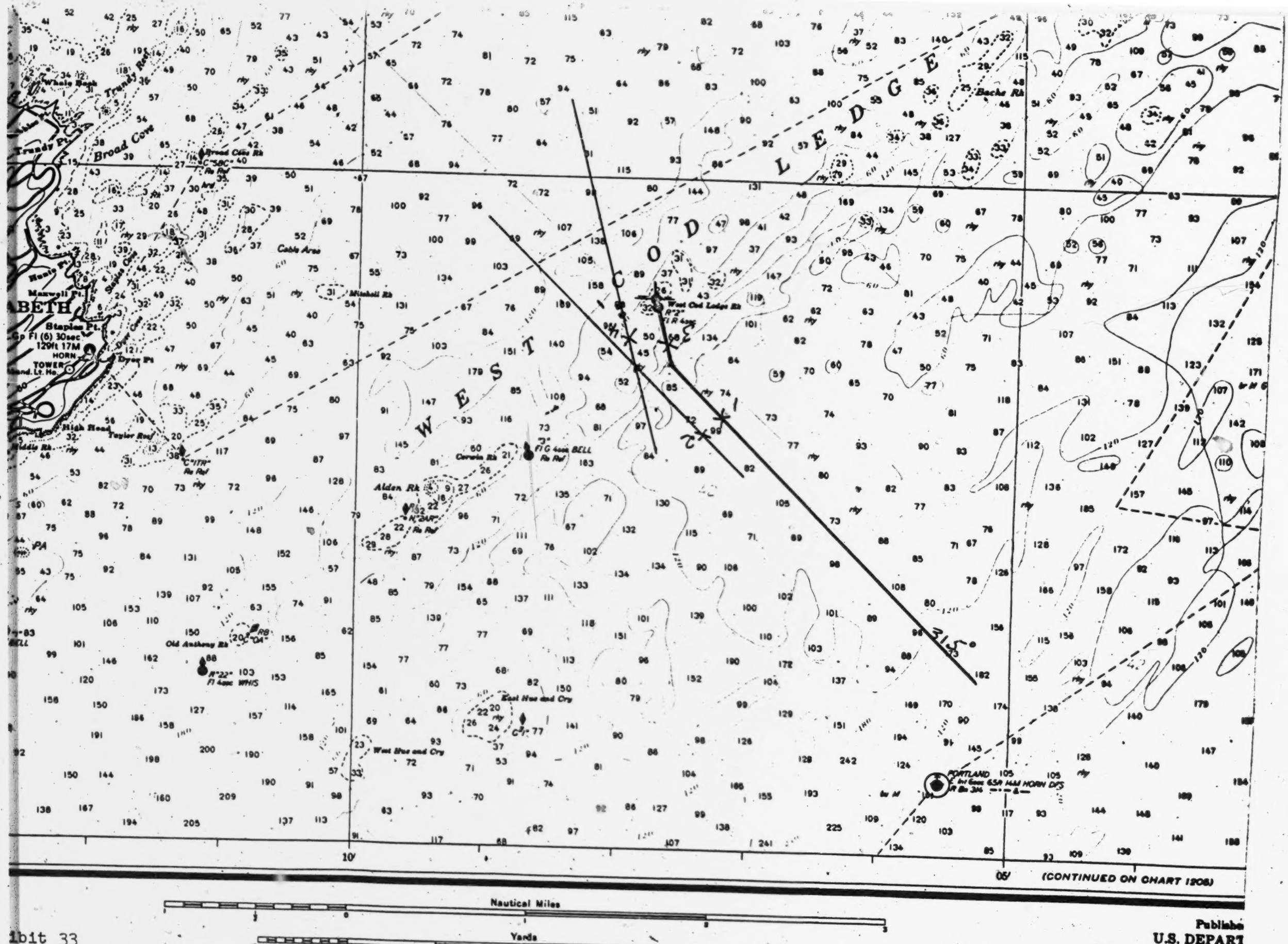


Exhibit 33

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ENVIRONMENTAL SCI
COAST AN

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SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUL 17 1971
E. ROBERT SEAVER, CLERK

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-299

UNITED STATES OF AMERICA,

Petitioner,

—v.—

AFRAN TRANSPORT COMPANY, AS OWNER OF THE STEAMSHIP NORTHERN GULF, *et al.*,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPH C. SMITH
Counsel for Respondent,
Afran Transport Company
25 Broadway
New York, New York 10004

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The petition adequately sets forth the citations of the Court of Appeals and District Court opinions, and the jurisdictional requisites.

Questions Presented

The questions presented by petitioner (p. 2)* characterize cautionary notes in the Code of Federal Regulations as a regulation having the force of law for the purpose of shifting the burden of proof under "The Pennsylvania" rule, 19 Wall. 125 to NORTHERN GULF, requiring her to show that failure to take bearings not only might not or probably did not but could not have contributed to the stranding.

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* Unless otherwise specified, all page references herein are to the petition and appendices A-D thereto.

The questions presented do not dispute that the cautionary language in the Code of Federal Regulations fails to mandate or prohibit any particular conduct sufficient to invoke the drastic rule of The Pennsylvania and ignores the specific conclusion of the District Court, affirmed by the Circuit Court of Appeals, that the cautionary language was just that (pp. 46, 61). "It is the essence of all cases that the statute or regulation be mandatory in character, as the rule is designed to compel compliance with clearly defined duties" (pp. 27-8).

Statement

The relevant facts, set forth in the Court of Appeals' opinion (pp. 19-20), are that on a bright, clear day, with almost unlimited visibility, the steamship NORTHERN GULF bound for Portland, Maine with a cargo of crude oil, on a course of 276° passed Portland Lightship abeam 700 yards off her port side and took on a compulsory state pilot, one-half mile northwest of the lightship in Casco Bay. Captain Harlan L. Wadleigh, the pilot, took the conn and set a course with the vessel heading 315° true, with Portland Head Light fine on the port bow and Buoy No. 2 marking West Cod Ledge Rock 15° on the starboard bow. Captain Wadleigh intended to pass one-quarter mile off Buoy No. 2. No bearings to obtain fixes were taken on the 315° course and had any such bearings been taken they would have shown that the NORTHERN GULF was on a course to pass safely by West Cod Ledge Rock. When Buoy No. 2 was off the starboard beam, Captain Wadleigh began his turn to starboard toward Witch Rock Buoy. During that swing it was manifestly impossible to take a running fix in time to avoid the stranding. Buoy No. 2 was 350 to 400 yards off

its charted position, which could not have been known to the pilot due to the wide expanse of open water in Casco Bay.

Petitioner has conceded its negligence in failing to maintain the Buoy in its proper position and now seeks to have this Court review the evidence and formulate a standard of care which it failed to establish at the trial.

ARGUMENT

Petitioner contends that there is an important question concerning the duty of a harbor pilot to utilize fixed aids to navigation rather than to rely upon floating buoys, premising its argument on the cautionary language in 33 C.F.R. §62.25-55 "as construed by the Coast Guard" who had the responsibility to maintain the "vast number of buoys" and an impertinent reference to the recently enacted Water Quality Improvement Act (pp. 9-10). Precise navigation of large tankers in restricted areas requires accurately marked channels and obstructions to permit prompt maneuvers to avoid other vessels and obstructions to navigation without risk of stranding in shallow water. The Coast Guard assumed this responsibility and petitioner cannot now argue that it is imprudent or negligent for a navigator to rely on a buoy to fix the position of a vessel. *Indian Towing Co.* v. *United States of America*, 350 U.S. 61, 69. The Court of Appeals said:

> "[I]n the absence of some suspicious circumstances or notice, navigators are entitled to rely upon the representations made in the Government charts relative to the location of the buoys" (p. 21).

To hold otherwise would be to preclude the use of a buoy as an aid to navigation in pinpointing the position of a vessel, which was the Coast Guard's expressed reason for maintaining the United States buoyage system. ("Buoys in Water of the United States," 1942; District Court opinion p. 46.)

The Trial Court on all the evidence, including the testimony of expert witnesses who regularly navigate large supertankers in and out of Casco Bay and other ports, found that the Coast Guard was negligent in maintaining Buoy No. 2 on its charted position and held that there was no negligence on NORTHERN GULF's part (pp. 41, 48). The forty-seven findings of fact, reviewed and affirmed by the Court of Appeals, amply support those conclusions.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

JOSEPH C. SMITH
Counsel for Respondent,
Afran Transport Company

July 15, 1971